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No. (1)

Supreme Court, U.S.
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In The

Supreme Court of the United States

ROBERT HENDERSON and THE STATE LAW ENFORCEMENT BARGAINING COUNCIL,

Petitioners,

v.

STATE OF NEBRASKA and THE NEBRASKA STATE PATROL,

Respondents.

On Petition For Writ Of Certiorari To The Nebraska Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Nebraska Supreme Court impermissibly reject findings of the arbitrator and substitute its own findings in contravention of federal law, thereby depriving Henderson of his constitutional and contractual rights?

2. May the Nebraska Supreme Court disregard an arbitrator's finding that Henderson's termination violated his First Amendment rights under the guise of the "public policy exception" contained in federal case law?

3. Did the Nebraska Supreme Court's decision violate Henderson's First Amendment Rights to Freedom of Expression and Association?

4. Did the Nebraska Supreme Court's judicial notice of and reliance on "legislative facts" expressed in unauthenticated external sources violate Henderson's due process rights?

5. Does a public policy dependent on "public perception," violate the due process rights of individuals otherwise entitled to notice and a hearing as to any wrongdoing?

6. Was the lower court required to determine whether the arbitration agreement involved interstate commerce and consequently fell under the Federal Arbitration Act, and if so, does the Act mandate a different result?

QUESTIONS PRESENTED – Continued

7. Did the Nebraska Supreme Court impermissibly expand the public policy exception doctrine, which was created from federal case law and which is in need of uniformity of interpretation, to the extent that the exception can contravene an arbitrator's finding of constitutional rights violations?

PARTIES TO THE PROCEEDING

Plaintiffs-Appellees below:

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CITATION TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS AND ORDERS

(i) The opinion of the Nebraska Supreme Court (App. 1-53) is reported at 277 Neb. 240 and 762 N.W.2d 1.

(ii) The Order for Reargument and Supplemental Briefing of the Nebraska Supreme Court (App. 156-157) is unreported.

(iii) The Order of the District Court of Lancaster County, Nebraska (App. 148-155) is unreported.

(iv) The Opinion and Award of the Arbitrator Paul J. Caffera (App. 54-147) is unreported.

STATEMENT OF JURISDICTION

(i) The opinion of the Nebraska Supreme Court from which review is sought was entered on February 27, 2009.

(ii) Rehearing in the Nebraska Supreme Court was not sought. An Application to Stay Mandate was filed in the Nebraska Supreme Court on March 3, 2009 and was sustained on April 8, 2009. No order granting an extension of time to file a petition for a writ of certiorari exists.

(iii) Rule 12.5 is not relied upon in this petition.

(iv) Statutory provisions conferring jurisdiction to review on a writ of certiorari the order in

question: 28 U.S.C. §1257 (State courts; certiorari).

(v) Rule 29.4(b) or (c) notifications are not required.

CONSTITUTIONAL PROVISIONS INVOLVED

First Amendment to the
United States Constitution

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Fourth Amendment to the
United States Constitution

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Fourteenth Amendment to the
United States Constitution, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Article 1, Section 10, clause 1
of the United States Constitution

No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligations of Contracts, or grant any Title of Nobility.

STATUTES INVOLVED

9 United States Code 2

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the

refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 United States Code 14

. . .

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

STATEMENT OF THE CASE

This case involves a state employee who was reinstated to his position as a Trooper with the Nebraska State Patrol after an arbitrator found that his firing violated his constitutional rights, as well as his contractual rights under a collective bargaining agreement, but who was thereafter judicially deprived of the arbitrator's decision under the guise of an impermissibly broad "public policy" exception, newly formulated from supposed public interests and

in disregard of the law to avoid a politically unpopular result.

After his wife left him for a Hispanic man, Robert Henderson visited a website maintained by an organization called the Knights Party. His visits to the site were exclusively during his non-working hours and on his personal computer. The Knights Party is an affiliate group of the Ku Klux Klan. Henderson paid a membership fee solicited by the site, which permitted him to post comments on the site. Henderson, using a pseudonym that identified him as "from Nebraska," posted several comments on the site in 2004. One comment described an incident in his life in which he was urged by others not to pursue what he perceived to be a legitimate complaint of wrongdoing by a black man, simply because the man was black. In his remaining comments, he identified himself as a law enforcement officer and inquired whether other members of the site were willing to talk to him, but he received no responses. A law enforcement group which regularly monitored the website saw Henderson's postings and alerted the Nebraska State Patrol that an officer in Nebraska was posting to the site. The Nebraska State Patrol initiated an internal investigation which led to Henderson being questioned, at which time he made a full and complete disclosure of his activities, which consisted of making a total of four anonymous postings to the website. At the completion of its internal investigation, the State Patrol terminated Henderson.

The State Law Enforcement Bargaining Council filed a grievance on Henderson's behalf pursuant to the applicable collective bargaining agreement, which required that any termination be for "just cause." Pursuant to the collective bargaining agreement governing Henderson's employment, unresolved grievances may be submitted to binding arbitration, and this was the adjudicatory vehicle chosen and agreed to by the parties. (App. 190). The parties agreed to a particular arbitrator, Paul J. Caffera. (App. 190). The arbitrator was asked to interpret the collective bargaining agreement, and determine the following stipulated issues:

> Did the Nebraska State Patrol violate the Collective Bargaining Agreement or its own operating procedures or policies when it disciplined the Grievant, Robert Henderson, on March 15th, 2006? If so, what shall be the remedy?

(App. 55).

The Collective Bargaining Agreement specifically provides that the Nebraska State Patrol, as employer, will not violate the constitutional or statutory rights of its employees. (App. 61). To resolve the issues presented, the arbitrator presided over a hearing of twelve hours duration, which included the submission of voluminous evidence and the sworn testimony and cross examination of numerous witnesses. (App. 54-55). The arbitrator issued a considered decision consisting of forty-seven pages in its original formatting. (App. 54-147). The arbitrator relied nearly

exclusively on federal cases, many of them First Amendment constitutional cases, to reach his conclusions. The arbitrator ultimately concluded, based on the extensive evidence presented, that Henderson's termination violated his rights under both the collective bargaining agreement and the United States Constitution. *Inter alia*, the arbitrator found:

> After considering the record before him, the Arbitrator has been persuaded that the State Patrol violated the Constitution, the Contract, and its own policies and procedures when it discharged the Grievant.
>
> . . .
>
> In short, the Department discharged the Grievant because of his beliefs and because he sought out others who shared his beliefs. The Arbitrator has been persuaded that this motivation for terminating the Grievant violated the Grievant's First Amendment Rights.

(App. 106-108).

These conclusions were supported by the arbitrator's further express finding that the State Patrol was unable to identify any instance in which Henderson had engaged in racially biased conduct on the job, or that such conduct was likely to take place in the future, and that all of Henderson's alleged misconduct occurred anonymously during non-work hours. (App. 107).

As a remedy, the arbitrator ordered reinstatement to Henderson's prior position, but deliberately permitted Henderson's employer to transfer him to any other position within the state patrol after such reinstatement, "if necessary to maintain the good order and efficiency of the Agency, or to eliminate/mitigate actual civil disruptions that may occur as a result of the public becoming aware of the Grievant's association with the Knight's Party, Christian Concepts, the Ku Klux Klan, or any other such group." (App. 145-146).

Following the arbitrator's decision, the State of Nebraska and the Nebraska State Patrol filed an action in the District Court of Lancaster County to vacate the arbitrator's award. In the District Court, Henderson and the State Law Enforcement Bargaining Council argued that the Court was required to accept the arbitrator's findings, including those on constitutional issues, and that to vacate the award would impermissibly undermine the arbitrator's findings. The District Court in a brief Order vacated the arbitrator's decision, determining that a "public policy" "against discrimination" provided an exception which permitted it to vacate the arbitrator's award. (App. 153-154). Henderson appealed the District Court's policy determination to the Nebraska Supreme Court. The Nebraska Supreme Court heard the case initially, and subsequently *sua sponte* entered an Order for Reargument, requiring the parties to respond to four specific questions relating to the so-called "public policy" exception defined by a trilogy of

three federal cases, *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983); *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987); and *Eastern Assoc. Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000). (App. 156-157). Each of these cases was decided under the Federal Arbitration Act (FAA), and each developed and defined the narrow "public policy exception" to arbitration awards.

Henderson and the State Law Enforcement Bargaining Council, in their written briefs to the Nebraska Supreme Court, focused on the absence of any public policy founded in law which would be violated by the arbitrator's remedy, and the necessity to defer to the legal and factual findings of the arbitrator. Amicus Curiae, the National Troopers Coalition, argued for the finality of the arbitration decision and presented argument that vacating the award would amount to permission to condition public employment on political affiliation in violation of First Amendment rights. At oral re-argument, counsel and the court discussed the federal constitutional issues in the following exchanges:

> JUSTICE WRIGHT: Counsel, are you arguing that, because of the arbitration agreement, that the Court cannot consider whether or not the award violated public policy?
>
> . . .

> MR. VALENTINO: Yes. That is – that I will tell you was considered by the arbitrator. And I'll show where it was considered by the arbitrator.
>
> MR. VALENTINO: 29.7.2 of our contract specifically provides in the procedures and safeguards section, that investigations conducted by the agency will not knowingly commit any act which would deprive the bargaining unit member of any statutory or *constitutional* privileges.
>
> That is in our contract. That is one of the things the arbitrator considered in this case. That is one of the things the arbitrator decided against the State based on the weight of the evidence presented to him.
>
> . . .
>
> Now, Justice Wright I want to get to your question.
>
> Exhibit No. 3 might – second page, Arbitrator Caffera, when he was addressing this at the very end, specifically said, "We have claims of First Amendment, Fourth Amendment and a relationship between those and the contract."

(App. 165-166) (Emphasis added).

Following oral re-argument and briefing, on February 27, 2009, in a 4-2 decision, the Nebraska Supreme Court issued an opinion upholding the decision of the District Court of Lancaster County to

vacate the arbitrator's award, and in doing so, anointed, "the public's reasonable perception that the laws are being enforced without racial or religious discrimination," as a well-defined and explicit state public policy, albeit somewhat different than the public policy relied upon by the District Court. (App. 35-36). The Nebraska Supreme Court further found that Henderson's reinstatement, "***would severely undermine reasonable public perception that the agency is uniformly committed to the equal enforcement of the law and that each citizen of Nebraska can depend on law enforcement officers to enforce the law without regard to race.***"

(App. 36) (Emphasis added).

As to the applicability of federal law to the issues presented, the Nebraska Supreme Court expressly observed in its Order:

> Arbitration in Nebraska is governed by the Federal Arbitration Act if it arises from a contract involving interstate commerce; otherwise it is governed by Nebraska's Uniform Arbitration Act. In this case, there is no claim that the transaction involved interstate commerce, so Nebraska law applies. We note, however, that because applicable provisions of the Uniform Arbitration Act and the Federal Arbitration Act are similar, we look to federal case law explaining the scope of judicial review of arbitration awards.

The Nebraska Supreme Court proceeded to rely on federal case law in adopting a "public policy exception."

Both the arbitrator and the Nebraska Supreme Court relied on and interpreted federal case law to reach their decisions. The Nebraska Supreme Court's decision ignored the arbitrator's finding that Henderson's termination was in violation of his federal constitutional rights. Truly, the vindication of Henderson's rights under the First, Fourth, and Fourteenth Amendments to the United States Constitution is at issue in this case.

ARGUMENT

WHY CERTIORARI SHOULD BE GRANTED

I. Introductory Statement

When an arbitrator finds that an employee's termination was in violation of his constitutional rights and that finding is thereafter usurped and reversed by the judiciary in spite of federal law and policy requiring it to accept the arbitrator's findings, a federal forum is critical for the aggrieved employee to vindicate his constitutional rights.

II. Presence of Federal Questions

The presence of federal questions in this case is demonstrated by the invocation of federal law by both the arbitrator and the Nebraska Supreme Court in

reaching their decisions, the applicability of the Federal Arbitration Act, and the implication of the Nebraska Supreme Court's decision on the federal First Amendment and Due Process constitutional rights of Robert Henderson.

A. Federal law provided the basis of the decision reached by the Nebraska Supreme Court

The Nebraska Supreme Court invoked federal law when it issued an Order for Reargument on the basis of three specific federal cases. (App. 157). The Nebraska Supreme Court relied exclusively on this federal case law to adopt a so-called "public policy" exception, which it used to justify its decision to vacate the arbitrator's remedy.

B. Absence of Independent and Adequate State Law Grounds

The instant case bears numerous similarities and one crucial difference from a case for which this Court granted certiorari in 1956. In *Black v. Cutter Laboratories*, 351 U.S. 292 (1956), an employee at a pharmaceutical products plant was terminated on the asserted grounds that she falsified her employment application and that she was a member of the Communist party. The employee grieved her discharge, and when unresolved, pursuant to a collective bargaining agreement, the matter was submitted to binding arbitration before a board of arbitrators. The

board of arbitrators found that the employee had been discharged not for "just cause," but instead for her constitutionally protected union activity, and that as a result, the discharge violated the collective bargaining agreement and the employee's constitutional rights. In its decision, the board of arbitrators ordered the employee's reinstatement as the remedy for the violation. Following a confirmation of the arbitration award by the trial court and after the award survived the employer's appeal to the Court of Appeals, the state Supreme Court reversed and vacated the board of arbitrators' reinstatement award. The state Supreme Court decision contained extensive discussion about the evils of the communist party and the Court rested its decision in large part upon a finding that reinstatement of a Communist worker would violate the state's "public policy."

The employee in *Black* petitioned for a writ of certiorari to this Court, alleging that the state Supreme Court's decision to vacate the board of arbitrator's award violated the Equal Protections and Due Process Clauses of the United States Constitution, because it conclusively presumed that the mere fact of membership in the Communist Party was equivalent to advocacy for violence, such that all contracts entered into by members of the Communist party would be void. Amicus argued in favor of the writ on the basis that the state Supreme Court's decision violated the employee's First Amendment rights. After granting a writ of certiorari, this Court found, in a 4 to 3 decision, that the state Supreme

Court's sweeping "public policy" rationale was not the sole ground upon which its judgment rested. Instead, a majority of this Court found that the state Supreme Court's judgment rested on adequate state law grounds that there was "just cause" for termination. As a result, the majority of this Court further found that no substantial federal question was presented, and dismissed the writ.

The instant case is, in several aspects, strikingly similar to *Black*. In both cases, an employee was terminated for her membership in a politically unpopular group, but was reinstated following arbitration involving express findings that the termination violated both the constitutional rights of the employee as well as a collective bargaining agreement, only for the arbitration award to be ultimately vacated by a State Supreme Court citing public policy as a reason. One significant difference between the *Black* case and the instant case is that *Black* involved a private employer, while the instant case involves a public governmental employer. But the crucial difference between the state Supreme Court decision in *Black* and the one entered by the Nebraska Supreme Court in the instant case is that the Nebraska Supreme Court rested its determination *solely* on a purported violation of judicially contrived public policy, without citing any independent state law grounds for its vacation of the arbitrator's decision.

In *Black*, this Court recognized that the public policy justification of the state Supreme Court

presented a federal question, but simply declined to reach the constitutional question because of the independent state law grounds for the decision. But in the instant case, the Supreme Court relied exclusively on a trilogy of federal cases to adopt, as a matter of first impression, a "public policy" exception. (App. 7, 10-17). Here, in the absence of any separate and independent state law grounds for the state Supreme Court's decision, the *Black* decision permits and endorses the vehicle of a writ of certiorari to review the important federal questions presented in the instant case. *See also, Michigan v. Long*, 463 U.S. 1032 (1983) (finding jurisdiction because the state court decision on a search and seizure issue in a criminal case rested primarily on federal law and/or was interwoven with federal law). The instant case squarely presents an opportunity to address the federal questions, some fifty years later, that could not be addressed for jurisdictional reasons in *Black*.

C. Applicability of the Federal Arbitration Act

As noted previously in the statement of facts, the Nebraska Supreme Court found that because the parties did not raise the issue of whether the Federal Arbitration Act (FAA) applied, that only state law would be applied by it, although it would use federal cases to guide its decision making. This is an unusual position, given that the Nebraska Supreme Court has not hesitated to apply federal law or other remedies

in its past cases when the applicability of federal law was not raised by the parties. *See Aramark v. Hunan, Inc.*, 276 Neb. 700, 757 N.W.2d 205 (2008) (finding that Federal Arbitration Act preempted the notice requirement in the Nebraska Uniform Arbitration Act); *Central States Resources, Corp. v. First National Bank in Morrill, Nebraska*, 243 Neb. 538, 501 N.W.2d 271 (1993) (applying federal statute of limitations, when parties raised and argued only the applicability of a state law statute of limitation); *Stewart Trucking, Inc. v. PBX, Inc.*, 238 Neb. 958, 473 N.W.2d 123 (1991) (court conducted "independent examination" of federal law to conclude that it did not prohibit reformation of contract under state law "mutual mistake" theory); *Ryan v. Ryan*, 257 Neb. 682, 600 N.W.2d 739 (1999) (court upheld part of VA disability pension decree *sua sponte* under federal law, though issue not argued by parties). The Nebraska Supreme Court, by invoking a trilogy of federal cases which interpret the Federal Arbitration Act, did invoke the Act *sub silencio*, and even if the parties themselves did not rely expressly on the Act, they presented argument based on the specified federal FAA cases as ordered by the Nebraska Supreme Court.

Regardless of the Nebraska Supreme Court's attempt to sidestep this issue, the facts contained in the record indicate that the Federal Arbitration Act is applicable in this matter, because Henderson's duties as a State Patrol officer arise out of and involve "interstate commerce." Each day, State Patrol officers travel and make traffic stops on the highways shared

by persons and goods passing between the various states. *See Overstreet v. North Shore Corporation*, 318 U.S. 125 (1943) (finding maintenance workers on toll bridge and drawbridge were "engaged in interstate commerce" under the Fair Labor Standards Act). Henderson's employer testified at the arbitration hearing that his traffic stops of motorists on the highways and interstates were racially "neutral" and showed no evidence of racially biased policing. The arbitrator found that Henderson had not engaged in racist acts on the job and that he would not be likely to in the future. (App. 107). The Federal Arbitration Act gives great deference to arbitral awards, while the decision of the Nebraska Supreme Court thwarts the goals of the FAA and is contrary to the intent of Congress in passing the FAA.

The Petitioner recognizes that the Federal Arbitration Act does not bestow federal jurisdiction over controversies touching arbitration, but rather requires an independent basis of jurisdiction. *Moses H. Cone Mem'l Hosp. v. Mercury Construction Corp.*, 460 U.S. 1, 22 (1983); *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008). But this case clearly has such an independent jurisdictional basis in the First and Fourteenth Amendment issues presented, which are more fully discussed below. The application of the Act is clearly a federal question that is best interpreted by this Court where there are other federal constitutional questions in the balance. The FAA requires state courts to enforce arbitration clauses in spite of state law or controversy to the

contrary. *Southland Corp. v. Keating*, 465 U.S. 1 (1984) (holding that the substantive law created by the FAA is applicable in state courts). Because the FAA may supercede state law, its applicability makes a strong argument for deference to the federal policies and case law on arbitration, as opposed to a state law decision creating public policy based on the state's localized concerns. *See Allen & Co, Inc. v. Shearson Loeb Rhoades, Inc.*, 111 A.D.2d 122, 489 N.Y.S.2d 500 (N.Y.A.D. 1st Dept. 1985) (declaring that FAA pre-empted state law in determining whether an arbitration award should be vacated). Certainly, the lower courts have been less than uniform in deciding in what circumstances the FAA preempts state law, and there is a need for guidance from this Court on the specific issue raised in this case, that is the contours of the "public policy exception" to arbitration awards.

The FAA case law is clear that the creation of any public policy must be ascertained by reference to "laws and legal precedents" not some perceived collection of supposed public policy interests. *Eastern Associated Coal Corp., supra.* The Nebraska Supreme Court's failure to follow this and other mandates of the federal case law severely undermines the policies behind the Federal Arbitration Act. These policies strongly favor arbitrator's decisions, and are offended by a judicial decision which uses the guise of "public policy" as a means of vacating an arbitrator's award, particularly when the arbitrator's award included an

express finding that an employee's constitutional rights were violated by his termination.

III. The Nebraska Supreme Court's decision is in violation of Henderson's federal constitutional rights

The Nebraska Supreme Court misinterpreted the federal case law on which it relied to reach a decision that violates Henderson's First Amendment freedoms of speech and association, as well as his Fourteenth Amendment Due Process rights.

A. The Nebraska Supreme Court erroneously rejected the legal and factual findings of the arbitrator, including that Henderson's termination was in violation of his First Amendment constitutional rights

There is no question that federal law requires that the findings of the arbitrator be accepted by a judiciary reviewing an arbitral decision. *United Paperworkers International Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 37-38 (1987). "The reasons for insulating arbitral decisions from judicial review are grounded in the federal statutes regulating labor management relations." *Id.*, 484 U.S. at 37 (1987).

The Nebraska Supreme Court paid lip service to the law which strictly limits judicial review of an arbitrator's factual and legal findings. The Order of the Nebraska Supreme Court states:

> Courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. In other words, a court may not overrule an arbitrator's decision simply because the court believes that its own interpretation of the contract, or the facts, would be the better one.
>
> Therefore, in this case, we do not revisit the arbitrator's factual findings, interpretation of the CBA, or ultimate conclusion that the State Patrol violated the CBA in its termination of Henderson's employment. Nor do we revisit the arbitrator's discussion of constitutional issues, although his conclusions on those issues are highly suspect.

(App. 8).

But a review of the Nebraska Supreme Court's decision shows that it does not square with the arbitrator's findings. This can best be explained by three salient examples.

First, the arbitrator found that Henderson had not engaged in any racially discriminatory conduct on the job, nor had the State Patrol shown that his return to work would result in any future disruptions or racial discrimination. Specifically, the arbitrator found:

> In the final analysis, all that the Agency presented to the Arbitrator was surmise and speculation that some operational or community-relations harm could occur . . .

> . . . Furthermore, there is no evidence or credible testimony that the Grievant's affiliation with the Knights Party/KKK . . . will likely impair "the operation or efficiency of the State Patrol or the employee. . . ."

(App. 132, 141-142).

The Nebraska Supreme Court, to the contrary, found that Henderson's reinstatement would create a "public perception" of discriminatory law enforcement. (App. 36, 39). It is also interesting to note that the Nebraska Supreme Court, in evaluating this question, did not address the impact that the State Patrol's own actions would have on the "public perception" of Henderson's reinstatement. Certainly, because the State Patrol filed an action in District Court seeking to vacate the arbitrator's award, the "public perception" must be that the State Patrol does not condone, and rather opposes having to employ an individual who is alleged to harbor racist beliefs. This is not a case in which the State Patrol made any effort to "protect its own," but instead it is a case in which an internal investigation was leaked to the public to avoid any "public perception" that the State Patrol endorses or has any affiliation with the KKK. Thus, not only were the Nebraska Supreme Court's findings related to the "public perception" directly contrary to the arbitrator's findings, but they were also inaccurate on their face.

Second, the arbitrator found, as part of his award, that Henderson's Colonel could reassign Henderson to any division or manner of work for the

State Patrol. The majority of the Nebraska Supreme Court completely ignored and made no mention of this part of the arbitrator's award, though professing to be focused on whether the "award" ordered by the arbitrator violated public policy. (App. 17).

Third, the arbitrator found that Henderson was fired for his beliefs and for seeking out others who shared those beliefs, in violation of his constitutional rights. Specifically, the arbitrator found:

> After considering the record before him, the Arbitrator has been persuaded that the State Patrol violated the Constitution, the Contract, and its own policies and procedures when it discharged the Grievant.
>
> . . .
>
> In short, the Department discharged the Grievant because of his beliefs and because he sought out others who shared his beliefs. The Arbitrator has been persuaded that this motivation for terminating the Grievant violated the Grievant's First Amendment Rights.

(App. 106-108).

The Nebraska Supreme Court, to the contrary, made no secret that it disagreed with the arbitrator's findings regarding constitutional violations, and ultimately found by implication that an asserted public policy violation should override the arbitrator's findings as to the violations of Henderson's constitutional rights. (App. 8, 39).

The above examples demonstrate that the majority of the Nebraska Supreme Court did not accept the legal and factual findings of the arbitrator as it is required by law to do, but that it instead impermissibly used a purported "public policy" to reject the findings of the arbitrator and instead substitute its own view of the facts.[1] To allow the Nebraska Supreme Court's decision to stand would significantly erode the narrow and restrictive "public policy exception" recognized and crafted by federal case law.

In this respect, the instant case again bears a similarity to the *Black* case, cited *supra*. In *Black*, the board of arbitrators expressly found that the employee's membership in the Communist party, though purported to mean the worker was necessarily sabotaging the company, in fact had absolutely no effect on the quality of her work according to the evidence presented, and that her job performance had been satisfactory. Similarly, in the instant case, the arbitrator expressly found that Henderson's membership in the Knights Party, though purported to mean he was necessarily engaging in racially discriminatory acts on the job, in fact had absolutely no effect on the quality of his work according to the evidence presented, and that his job performance had actually

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[1] In this manner, the Nebraska Supreme Court's decision amounted to the kind of "heckler's veto" that this Court has in the past condemned in other constitutional contexts. *E.g., Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997).

been satisfactory. The arbitrator's findings included the following:

> . . . The Grievant was not fired because of his actions on the job; the antagonism the Grievant seems to feel towards non-white racial groups has never reared its ugly head on the job. The Department's traffic-stop data clearly shows that the Grievant has made stops in a race-neutral manner . . .
>
> . . . The Department was not able to point to a single instance on the job – or for that matter at any time, including his off-duty hours – where the Grievant's actions exhibited any hatred, anger, disgust, or discrimination toward any minority group.

(App. 107).

In *Black*, the state Supreme Court also selected certain language from the board of arbitration's decision and concluded that it amounted to a finding that the worker was dedicated to sabotage, force, and violence. Similarly, the Nebraska Supreme Court in the instant case disregarded those portions of the arbitrator's decision it disagreed with to ultimately draw conclusions that are strongly refuted by the evidence in the record before the arbitrator and are directly contrary to the arbitrator's actual findings. The arbitrator in the instant case found:

> The Record clearly shows that the names "Ku Klux Klan" and "KKK" are in the public domain, and not owned by any single organization. As such, any group with a desire to

> use those names may do so. Some of these groups are clearly violent and or criminal. The Record shows no act of violence or criminal activity even alleged, let alone proved, against the group the Grievant joined, the Knight's Party.

(App. 137).

Clearly, this finding is inconsistent with the finding of the majority of the Nebraska Supreme Court that, "we have little difficulty in concluding that for all practical purposes, joining the Knights Party is the same as joining the historical Ku Klux Klan. Nor is it difficult to conclude that the historical Ku Klux Klan represents discrimination, violence, and armed resistance to lawful authority." (App. 30).

The dissent to the Nebraska Supreme Court's decision, authored by Justice Kenneth Stephan, and joined in by Justice Connolly, pointed out the majority's failure to accept the findings of the arbitrator:

> In my view, the majority has rejected the findings of the arbitrator and redecided the merits of this case under the guise of public policy. I could accept the reasoning of the majority that Henderson's reinstatement would foster "the perception that some citizens of Nebraska do not enjoy the same protection by law enforcement as others" if the arbitrator had made any findings that Henderson's affiliation with the Knights Party affected the performance of his duties,

> because in that circumstance there would be a factual basis upon which to conclude that Henderson could not be trusted with the duties and responsibilities of law enforcement. But the arbitrator actually made specific affirmative findings that Henderson's beliefs "have not interfered with his impartial enforcement of the law," and it is therefore entirely speculative to conclude that the public would have a contrary perception if he were reinstated. (App. 50).

This excerpt of the dissenting opinion highlights the grievous error in the reasoning of the majority of the Nebraska Supreme Court in this case.

Of all of the examples noted above, perhaps the most egregious of the ways in which the Nebraska Supreme Court disregarded the findings of the arbitrator was in choosing to ignore the arbitrator's finding that Henderson's constitutional rights had been violated. As explained by the dissenting Justices:

> . . . I am concerned that the majority understates the significance of the arbitrator's finding that Henderson's discharge violated his First Amendment rights. Again, while we may disagree strongly with this finding, we are bound by it in the procedural posture of this case. That being so, the result reached by the majority necessarily implies that it is willing to ignore the State's violation of Henderson's constitutional rights because if he were reinstated, the public may perceive

> that he may violate someone else's rights in the future, despite the arbitrator's specific findings that he has never done so in the past. In my view, this apparent subordination of individual constitutional rights to the "greater good" poses a far greater risk of harm to the public policy of this state than reinstating one misguided trooper and reassigning him to some mundane position well behind the front lines of law enforcement, where he would pose no actual or reasonably perceivable threat to the mission of the State Patrol or welfare of the public it serves.

(App. 52-53).

Truly, the majority of the Nebraska Supreme Court allowed Henderson's constitutional rights to fall victim to an apparent fear, however unfounded and contrary to the arbitrator's findings, that Henderson would begin engaging in racial profiling on the job if he were reinstated.

The Nebraska Supreme Court in this case asserts to have based its decision to vacate the arbitrator's award on the public policy exception contained in the trilogy of federal cases, *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757 (1983); *United Paperworkers Internat. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29 (1987); and *Eastern Assoc. Coal Corp. v. United Mine Workers*, 531 U.S. 57 (2000). But in none of these three cases did the arbitrator's decision involve a finding that the employer's actions constituted constitutional

violations. Here, the facts have an inescapable First Amendment dimension, because the decision below is predicated on a finding that Henderson should be deprived of his public employment on the sole basis of his decision to express his thoughts and beliefs in written postings to the Knights Party website. *O'Hare Truck Service, Incorporated v. City of Northlake*, 518 U.S. 712 (1996) (discussing First Amendment free speech rights).

Henderson was punished by his employer with adverse action for conduct that the arbitrator found to be constitutionally protected pursuant to the rights of free speech, association, and assembly under the First Amendment. This Court has steadfastly protected employees who face adverse employment action by their employers for their constitutionally protected conduct. *See National Association for the Advancement of Colored People v. Button*, 371 U.S. 415, 83 S.Ct. 328 (1963) (describing First Amendment free speech rights); *Elfbrandt v. Russell*, 384 U.S. 11, 86 S.Ct. 1238 (1966) (sustaining teacher's First Amendment freedom of association challenge to a loyalty oath penalizing those who might join an organization which engaged in unlawful activities but who themselves did not subscribe to the unlawful activities of the organization); *Baird v. State Bar of Arizona*, 401 U.S. 1 (1971) (finding that prospective attorney was protected by First Amendment from being compelled to answer a question on her application to the state bar concerning whether she had ever been a member of any organization which

advocates the overthrow of the government by force or violence). In defending himself against his employer's motion to vacate the arbitrator's decision, Henderson was, in a very real way, fighting to vindicate his constitutional rights as found by the arbitrator. *See Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891 (1987) (clerical employee successfully sued employer for terminating her after she made a political comment protected by the First Amendment). This constitutional aspect makes the instant case unique when compared to other state cases using the "public policy exception" to vacate arbitration awards.

As this Court has frequently recognized, the fact that Henderson's thoughts were politically unpopular does not make them any less worthy of constitutional protection. *See Virginia v. Black*, 538 U.S. 343 (2003) (noting that the "hallmark" of First Amendment freedom of speech is to "allow 'free trade of ideas' – even ideas the overwhelming majority of people might find distasteful or discomforting"); *Saxe v. State College Area School District*, 240 F.3d 200 (3rd Cir. 2001) (observing, "there is of course no question that the free speech clause protects a wide variety of speech that listeners may find deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs") (*citing Brandenberg v. Ohio*, 395 U.S. 444 (1969); *Cantwell v. Connecticut*, 310 U.S. 296 (1940)). Even if Henderson's contractual rights had not been violated, this would not prevent the arbitrator from reinstating

him based on his finding of a constitutional violation alone. *See Perry v. Sinderman*, 408 U.S. 593 (1972) (finding that professor's lack of contractual right to re-employment did not deprive him of right to assert that termination violated his right to free speech).

Here, the Nebraska Supreme Court held that even assuming, as the arbitrator found, that the contract of the parties and the constitution did not permit the discharge of Henderson for his membership in the Knights Party, that contract and the constitutional rights of employees may be usurped on the basis of a contrary contrived "public policy." In so holding, the court gave its judicial stamp of approval for public employers to disqualify an entire political group from employment. Yet, the well established law of this Court provides that it is unconstitutional for public employees to be denied their employment due to his or her political beliefs or his or her party affiliation. *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

The Petitioner knows of none and can locate no law that permits the narrow "public policy exception" to be used in such a manner that the public policy relied upon "trumps" or overrides the federal constitutional rights of a party to arbitration.

B. The Nebraska Supreme Court decision infringes upon Henderson's Due Process Rights

It is likewise clear that in addition to the First Amendment issues, the Due Process Clause is

implicated by the facts of this case as well. "Freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause, which embraces freedom of speech." *National Association for the Advancement of Colored People v. State of Alabama*, 357 U.S. 449 (1958); *Montgomery v. Mississippi*, 498 F.Supp.2d 892 (S.D. Miss. 2007). The Fourteenth Amendment protects an individual's right to his "liberty" or "property" interest in his employment in certain circumstances, where there is some proven basis for a terminated employee to believe that he has an interest in his employment.[2] *See Board of Regents v. Roth*, 408 U.S. 564 (1972) (discussing Fourteenth Amendment due process interests in employment).

While the *Roth* case, *supra*, dealt primarily with procedural due process, the substantive component of due process is especially noteworthy in the context of this case. It is this component of the Due Process Clause that bars arbitrary and wrongful government actions regardless of the fairness of the procedures used to implement them. *Daniels v. Williams*, 474 U.S. 327, 331 (1986). As a general matter, a substantive due

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[2] The collective bargaining agreement guarantees that disputes may be submitted to binding arbitration and guarantees the due process rights of State Patrolmen. The arbitrator's decision in this case can thus be viewed as incorporated into the contract, such that the Nebraska Supreme Court's creation of "public policy" to utilize as a means of vacating the arbitrator's decision becomes synonymous to unconstitutional impairment of the parties' contract.

process claim in the public employment context requires a showing that the employee had a property interest in his employment and that the employer's termination of that interest was arbitrary, capricious, or tainted by ill will or improper motives. *Regents of University of Michigan v. Ewing*, 474 U.S. 214 (1985). The collective bargaining agreement in this case, when coupled with the arbitrator's interpretation of that contract, and the intertwined deprivation of First Amendment rights, taken together, demonstrate that Henderson had a fundamental right to continued public employment under the circumstances of this case. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985) (recognizing that public employees have a constitutionally protected property interest in continued employment for purposes of procedural due process). Here, the Nebraska Supreme Court violated that interest by conjuring a public policy based on supposed public interests rather than by reference to well established law and legal precedent, all to reach a politically desirable end result of preventing a person with former ties to an organization affiliated with the KKK from being publicly employed.

1. The Nebraska Supreme Court's purported "public policy" was formed in a manner contrary to federal law in that it was impermissibly ascertained from "general considerations of supposed public interests" rather than by reference to laws and legal precedent

The trilogy of federal cases relied upon by the Nebraska Supreme Court in this case are steadfast in that any public policy used to vacate an arbitration award "must be ascertained by reference to laws and legal precedents, not from general considerations of supposed public interests." *See Eastern Coal*, *United Paperworkers*, and *W.R. Grace, supra*. The Nebraska Supreme Court relied generally on inapposite anti-discrimination laws to form its policy against discrimination, but then went a step further in including the "public perception" of possible discrimination in its so-called "public policy." (App. 30-36). The "laws and legal precedents" referenced by the Nebraska Supreme Court to reach its conclusion regarding "public perception" were limited to comments from legislative floor hearings on racial profiling laws and judicial conduct rules regarding "the appearance of impropriety." (App. 30-32).

Incredulously, the Nebraska Supreme Court extrapolated from this material to create a "well defined and dominant" public policy based on the danger of people's "perception." (App. 32-36). Specifically, the Nebraska Supreme Court concluded that it

is "the clearly established public policy of the State of Nebraska that the law should be enforced without discriminating based on the race of its citizens." (App. 35). The Court went on to hold that this policy "incorporates" the "public's reasonable perception that the laws are being enforced without discrimination." (App. 35). This was scarcely an adequate basis upon which to deprive Henderson of his fundamental right to continued employment. Additionally, the Nebraska Supreme Court's decision places the danger of "public perception" in a position of greater importance than the violation of Henderson's constitutional and contractual rights. The Nebraska Supreme Court did not refer to any past precedent in doing this, nor does any precedent exist which would allow this to occur.

The Nebraska Supreme Court in this case further rested its decision not on the arbitrator's record and factual findings, but seemingly on "judicial notice" of a variety of "legislative facts" borrowed from articles and books written about the purported history of the Ku Klux Klan. The parties were wholly unaware that the Court intended to rely on these external sources. Henderson and his union had no opportunity to respond to or contest the validity of these sources of "legislative facts." There was no allowance to demonstrate to what extent there may be authority or equally reputable scholarly books or articles expressing ideas to the contrary of these sources. The Nebraska Supreme Court, in reciting an extensive history of the Ku Klux Klan in its opinion,

relied on books called "White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction," "Nazis, Communists, Klansman, and Others on the Fringe: Political Extremism in America," as well as journal articles such as, "The Ku Klux Klan in Nebraska, 1920-1930." (App. 24-29). The Nebraska Supreme Court further relied on material viewed on the website of the Anti-Defamation League and on a television broadcast by National Geographic. (App. 24-29). This, in spite of the arbitrator's citation to at least one source stating that there is "no such thing as the Ku Klux Klan anymore," and the arbitrator's specific findings about the diverse groups of Ku Klux Klan affiliates, including some offshoot groups which do not condone violence. (App. 96, 136-139).

A court may take judicial notice of adjudicative or legislative facts. An informative discussion of the dimensions of the term "legislative facts" is contained in the dissenting opinion of Judge James Hunter in a products liability case, *In re Asbestos Litigation v. Johns-Manville Sales Corp.*, 829 F.2d 1233 (3rd Cir. 1987). Judge Hunter's views include the following:

> Legislative facts are those which have relevance to the legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body. Legislative facts are those social, economic, and philosophical facts upon which we rely to fashion just, appropriate, and suitable rules of law. . . .

> . . . The United States Supreme Court regularly takes judicial notice of legislative facts to resolve cases involving major policy determinations in the areas of constitutional law and criminal procedure. However, I have never heard of any case in which the resolution of an ultimate fact – *e.g.*, the innocence or culpability of a products liability defendant – was reached through the judicial notice of legislative facts. A judicial notice of adjudicative-type facts as "legislative facts" would constitute a denial of due process and a violation of the bill of attainder clause. Ultimate facts cannot be resolved by judicial notice of legislative facts.

Here, the Nebraska Supreme Court relied heavily on its "history" of the Ku Klux Klan, which it based entirely on purported "legislative facts" judicially noticed, for its resolution of the ultimate fact that Henderson's reinstatement violated public policy.

It is not difficult to see how the development of this case precedent can be further analogized to a bill of attainder that legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial. *Selective Service System v. Minnesota Public Interest Research Group*, 468 U.S. 841 (1984). The prohibition on bills of attainder by the states is contained in Art. I, §10, cl. 1 of the United States Constitution. In this case, Henderson was judged and punished not for the actual conduct he engaged in, but for all of the acts committed in the course of history by members of the

Ku Klux Klan. By taking judicial notice of purported "legislative facts" about the Ku Klux Klan without allowing Henderson the opportunity to respond, the Nebraska Supreme Court deemed him guilty by association.

Again, a parallel can be raised to the *Black* case, *supra*. As noted in the joint dissent of three justices in *Black*, the employee in that case was punished for her beliefs, not any actual misconduct on the job. Henderson too was punished for his beliefs, not for misconduct, and for a fear of some potential future misconduct, not for any misconduct that actually occurred. The dissent in *Black* also recognized that while a particular industry may have a particular interest in avoiding employing those belonging to a certain group, because its ideologies are particularly repugnant to its mission and purpose, that does not excuse the discharge of a particular individual for belonging to the group when that individual has not been found to have engaged in any of the feared wrongdoing characteristic of the group to which he or she belongs.

Similarly, the arbitrator in the instant case emphasized in his factual findings that Henderson was "not a white-hooded cross burning terrorist" as is often feared at the mention of any association with the Ku Klux Klan, nor was there any evidence that Henderson associated with criminals or that he or the Knights Party was involved in any form of violence. (App. 136-138). It was therefore incorrect for the Nebraska Supreme Court to conclude that Henderson's

mere membership alone, without more, necessarily meant he shared in any particular ideologies that would cause his reinstatement to damage "public perception that laws are being enforced without racial discrimination." Such a decision caused Henderson to be "guilty by association" without any due process opportunity for notice and a hearing.

The Nebraska Supreme Court's heavy reliance on "legislative facts" to form its "public policy" reliant on "public perception" raises significant due process concerns. The parties were given no opportunity to respond to these judicially noticed facts. The "facts" found were contrary to the factual findings of the arbitrator. A state court decision which contravenes an employee's due process rights in these ways cannot be allowed to stand, particularly when "judicially created evidence" is recited in an opinion overturning an arbitrator's factual findings.

2. The Nebraska Supreme Court improperly focused on the conduct rather than the remedy, in violation of the applicable federal case law defining the "public policy exception"

The Nebraska Supreme Court states in its Order that the founded violation of public policy is evidenced by Henderson's "behavior of the gravest nature," in knowingly and willingly affiliating himself with the Ku Klux Klan. (App. 37). The Court clearly misunderstands the well-established principle that in

deciding whether an award should be enforced, the focus must remain solely on the remedy of reinstatement, not the underlying behavior. *Eastern Coal, supra*. The majority entirely failed to consider whether the arbitrator's award, which allowed Henderson to be moved into a position with no public contact, would violate public policy. As pointed out by the dissenting opinion of the Nebraska Supreme Court:

> In concluding that Henderson's reinstatement would violate public policy by creating a public perception of discriminatory law enforcement, the majority disregards the following provision of the award specifically designed to prevent or mitigate such perception:
>
> > Nothing in this Award shall prevent the Nebraska State Patrol from reassigning [Henderson] in the future, if necessary to maintain the good order and efficiency of the Agency, or to eliminate/mitigate actual civil disruptions that may occur as a result of the public becoming aware of [Henderson's] association with the Knights Party, Christian Concepts, the Ku Klux Klan, or any other such group[.]
>
> Henderson's counsel acknowledged at oral argument that if the award were enforced and Henderson were reinstated, the State Patrol "could assign him to the supply division. They could [assign] him to communications. They could have him cleaning out desks for the next three or four years if they wished to do that." Other courts, including the Supreme

> Court, have considered the flexibility of an arbitral award of reinstatement in considering whether it violated public policy.

(App. 50-51, 171).

The majority of the Nebraska Supreme Court erroneously focused on the fact of a Knights Party membership, without recognizing that in essence, it was a past membership, as Henderson was no longer a member and if he had been reinstated per the arbitrator's order, he would have been a one-time, not a current, member. Consequently, the Nebraska Supreme Court's decision would automatically sanction the termination of a non-member merely accused of or thought to be a member or affiliate, or an individual that had once been a member, but had since recanted and changed his ways. This methodology further demonstrates that the Nebraska Supreme Court acted in a manner contrary to law, and evidences an improper motive violative of Henderson's substantive due process right to his continued employment.

CONCLUSION

If the Nebraska Supreme Court is permitted to override the arbitrator's decision with regard to Henderson's constitutional and contractual rights on the basis of a misapplied public policy exception, the federal policies regarding arbitration will be severely undermined and dangerous precedent will be set.

What was intended as a narrow and very restrictive public policy exception will be broadened and elevated to the point where it literally is of greater importance than one's constitutional rights. To avoid this undesirable result, the Petitioners pray this Court grant its Petition for a Writ of Certiorari to permit full consideration of these important federal questions.

DATED: May 6, 2009.

Respectfully submitted,

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State Law Enforcement
Bargaining Council.

277 Neb. 240

Supreme Court of Nebraska.
STATE of **Nebraska** and
the **Nebraska State** Patrol,
appellees,
v.
ROBERT **HENDERSON** AND THE STATE LAW
ENFORCEMENT BARGAINING COUNCIL,
appellants.
No. S-07-010.

Feb. 27, 2009.

Syllabus by the Court

1. Arbitration and Award: Appeal and Error. In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.

2. Arbitration and Award: Contracts. Arbitration is not a judicial proceeding; it is purely a matter of contract.

3. Arbitration and Award: Federal Acts: Contracts. Arbitration in Nebraska is governed by the Federal Arbitration Act if it arises from a contract involving interstate commerce; otherwise, it is governed by Nebraska's Uniform Arbitration Act.

4. Arbitration and Award: Contracts: Appeal and Error. Courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts. A court may not overrule an arbitrator's decision simply because the court believes that its own interpretation of the contract, or the facts, would be the better one.

5. Arbitration and Award: Public Policy. A court may refuse to enforce an arbitration award that is contrary to a public policy that is explicit, well defined, and dominant. Such a public policy must be ascertained by reference to laws and legal precedents, not from general considerations of supposed public interests, but the arbitration award need not itself violate positive law to be unenforceable as against public policy.

6. Public Policy: Discrimination. It is an explicit, well-defined, and dominant public policy of the State of Nebraska that the laws of Nebraska should be enforced without racial or religious discrimination.

7. Public Policy: Public Officers and Employees: Discrimination. Nebraska public policy precludes an individual from being reinstated to serve as a sworn officer in a law enforcement agency if that individual's service would severely undermine reasonable public perception that the agency is uniformly committed to the equal enforcement of the law and that each citizen of Nebraska can depend on law enforcement officers to enforce the law without regard to race.

Appeal from the District Court for Lancaster County: Jeffre Cheuvront, Judge. Affirmed. Vincent Valentino for appellants.

Jon Bruning, Attorney General, and Tom Stine for appellees.

John E. Corrigan, of Dowd, Howard & Corrigan, L.L.C., and Lawrence P. Schneider, of Knaggs, Harter, Brake & Schneider, P.C., for amicus curiae National Troopers Coalition.

Aaron Nisenson, of International Union of Police Associations, AFL-CIO, and Jane Burke, of Keating, O'Gara, Nedved & Peter, P.C., for amicus curiae International Union of Police Associations, AFL-CIO.

David J. Kramer and Quinn Vandenberg, of Baird, Holm, L.L.P., and Clare Pinkert, Steven C. Sheinberg, Steven M. Freeman, and Deborah R. Cohen, of Anti-Defamation League, for amicus curiae Anti-Defamation League.

WRIGHT, CONNOLLY, GERRARD, STEPHAN, McCORMACK, and MILLER-LERMAN, JJ., and SIEVERS, Judge.

GERRARD, J.

From its very inception, the State of Nebraska has been founded upon principles of equality and tolerance that the Ku Klux Klan, from its very inception, has used violence and terror to oppose. When Robert Henderson, a veteran trooper of the Nebraska State Patrol, joined the Ku Klux Klan, he voluntarily

associated himself with an organization that is expressly opposed to Nebraska's founding principles. To reinstate Henderson as a sworn officer of the Nebraska State Patrol would violate this state's explicit, well-defined, dominant public policy. For that reason, we affirm the district court's decision to vacate an arbitration award in Henderson's favor.

BACKGROUND

On November 1, 2005, an internal affairs investigator for the Nebraska State Patrol was informed that a member of the State Patrol might be participating in online discussions at a members-only Web site associated with the Ku Klux Klan. An investigation was commenced which revealed that appellant Henderson had joined the Knights Party, a Ku Klux Klan-affiliated organization, and participated in online discussions in a Knights Party online discussion forum. The investigating officer found that Henderson's membership reflected negatively on the State Patrol and brought the State Patrol into disrepute.

Henderson was fired for his activities, and the State Law Enforcement Bargaining Council (SLEBC) filed a grievance on Henderson's behalf, pursuant to the relevant collective bargaining agreement (CBA). When the grievance was not resolved, it was submitted to binding arbitration pursuant to the CBA. The arbitrator determined that the firing violated the CBA, because, according to the arbitrator, the State

Patrol had violated Henderson's constitutional rights, and did not have "just cause" for terminating his employment under the CBA. The arbitrator ordered that Henderson be reinstated to his previous duties. The State Patrol, pursuant to Nebraska's Uniform Arbitration Act,[1] filed an application in the district court to vacate the award.[2] The district court granted the application to vacate the award, finding that the award violated "a well-defined and dominant public policy of this state." Henderson and SLEBC appeal.

ASSIGNMENT OF ERROR

Henderson and SLEBC assign, restated and consolidated, that the district court erred in vacating the arbitrator's award and instead should have confirmed the award.

We note the State Patrol's argument that Henderson lacks standing to prosecute this appeal. But while the original notice of appeal in this case was filed by Henderson, an amended notice of appeal was timely filed on behalf of Henderson and SLEBC. The State Patrol concedes that SLEBC has standing to appeal. Therefore, we do not address Henderson's standing, because all the issues raised by him have also been raised by SLEBC.

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[1] Neb.Rev.Stat. §§ 25-2601 to 25-2622 (Reissue 2008).

[2] *See* § 25-2613.

STANDARD OF REVIEW

In reviewing a district court's decision to vacate, modify, or confirm an arbitration award under Nebraska's Uniform Arbitration Act, an appellate court is obligated to reach a conclusion independent of the trial court's ruling as to questions of law. However, the trial court's factual findings will not be set aside on appeal unless clearly erroneous.[3]

ANALYSIS

NATURE AND PRINCIPLES OF ARBITRATION

Arbitration is not a judicial proceeding; it is purely a matter of contract.[4] In this case, the CBA between the State Patrol and SLEBC provides that if an employee's grievance is not satisfactorily resolved, it may be referred to arbitration. The parties in this case do not dispute that Henderson's grievance was properly submitted to arbitration.

Arbitration in Nebraska is governed by the Federal Arbitration Act if it arises from a contract

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[3] *Hartman v. City of Grand Island*, 265 Neb. 433, 657 N.W.2d 641 (2003). *See, also, e.g., PaineWebber, Inc. v. Agron*, 49 F.3d 347 (8th Cir.1995); *C.R. Klewin Northeast v. City of Bridgeport*, 282 Conn. 54, 919 A.2d 1002 (2007) (determination of whether arbitration award violates public policy is reviewed de novo by appellate court).

[4] *See Cornhusker Internat. Trucks v. Thomas Built Buses*, 263 Neb. 10, 637 N.W.2d 876 (2002).

involving interstate commerce[5]; otherwise, it is governed by Nebraska's Uniform Arbitration Act.[6] In this case, there is no claim that the transaction involved interstate commerce, so Nebraska law applies. We note, however, that because the applicable provisions of the Uniform Arbitration Act and the Federal Arbitration Act are similar, we look to federal case law explaining the scope of judicial review of arbitration awards.

We have explained that judicial review of an arbitrator's award is severely circumscribed.[7] Appellate review of an arbitrator's award is necessarily limited because "'to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all – the quick resolution of disputes and the avoidance of the expense and delay associated with litigation.'"[8] Strong deference is due an arbitrative tribunal.[9]

And when parties agree to arbitration, they agree to accept whatever reasonable uncertainties might

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[5] *See* 9 U.S.C. §§ 1 to 16 (2006). *See, also, Southland Corp. v. Keating*, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984); *Smith Barney, Inc. v. Painters Local Union No. 109*, 254 Neb. 758, 579 N.W.2d 518 (1998).

[6] §§ 25-2601 to 25-2622. *See Hartman, supra* note 3.

[7] *Jones v. Summit Ltd. Partnership Five*, 262 Neb. 793, 635 N.W.2d 267 (2001), citing *Apex Plumbing Supply v. U.S. Supply Co.*, 142 F.3d 188 (4th Cir.1998).

[8] *Jones, supra* note 7, 262 Neb. at 798, 635 N.W.2d at 271.

[9] *Id.*

arise from the process.[10] Because the parties to a collective bargaining agreement have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept.[11] Courts do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts.[12] In other words, a court may not overrule an arbitrator's decision simply because the court believes that its own interpretation of the contract, or the facts, would be the better one.[13]

Therefore, in this case, we do not revisit the arbitrator's factual findings, interpretation of the CBA, or ultimate conclusion that the State Patrol violated the CBA in its termination of Henderson's employment. Nor do we revisit the arbitrator's discussion of constitutional issues, although his conclusions on those issues are highly suspect.[14] The State Patrol does not contend, nor is there any basis in the record to conclude, that any of the statutory bases

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[10] *Id.*, citing *Raiford v. Merrill Lynch, Pierce, Fenner & Smith*, 903 F.2d 1410 (11th Cir.1990).

[11] *Paperworkers v. Misco, Inc.*, 484 U.S. 29, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987).

[12] *Id.*

[13] *See W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983).

[14] *See, e.g., Weicherding v. Riegel*, 160 F.3d 1139 (7th Cir.1998); *McMullen v. Carson*, 754 F.2d 936 (11th Cir.1985).

under the Uniform Arbitration Act for vacating an arbitration award are applicable in this case.[15] Instead, the issue in this appeal is whether the district court correctly determined that the arbitrator's award can be vacated, as the State Patrol contends, because reinstating Henderson to the State Patrol would be contrary to public policy.

In that regard, we note that the sole matter submitted to the arbitrator for disposition was, "Did the Nebraska State Patrol violate the [CBA] or its own operating procedures or policies when it disciplined the Grievant, . . . Henderson, on March 15, 2006? If so, what shall be the remedy?" The issue submitted for arbitration was consistent with the CBA, which defines a "grievance" subject to arbitration as "a claimed breach, misinterpretation, or misapplication of the terms of this Agreement." The arguments of the parties, and the decision of the arbitrator, touch on constitutional issues. But we view those issues, in light of the scope of the CBA and arbitration agreement, to be subsumed in the question whether the CBA was violated – and thus in the question whether the remedy for that violation violates public policy. In other words, we do not view this case as presenting a civil rights claim and do not address what remedy, if any, might be appropriate for any alleged violation of Henderson's constitutional rights. We note that compensatory damages might be

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[15] *See* § 25-2613(a).

available to a plaintiff injured by a breach of contract even when specific performance of the contract would violate public policy.[16] But the only issue before the arbitrator in this case was the application of the CBA, and the only issue before this court is whether the arbitrator's remedy for violation of the CBA is enforceable.

PUBLIC POLICY EXCEPTION

We have not previously addressed whether an arbitration award, under the Uniform Arbitration Act, can be vacated by a court on public policy grounds. The State Patrol argues that we should adopt such a doctrine, using the reasoning of the U.S. Supreme Court in cases such as *W.R. Grace & Co.*[17]; *Misco, Inc.*[18]; and *Eastern Associated Coal Corp. v. Mine Workers.*[19]

In *W.R. Grace & Co.*, an arbitrator found that an employer had unlawfully laid off employees in violation of a collective bargaining agreement, despite the fact that the employer had been attempting to comply with a conciliation agreement with the Equal Employment Opportunity Commission. The employer sought to vacate the arbitrator's award on the ground

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[16] *See W.R. Grace & Co., supra* note 13.

[17] *Id.*

[18] *Misco, Inc., supra* note 11.

[19] *Eastern Associated Coal Corp. v. Mine Workers,* 531 U.S. 57, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000).

that it violated public policy. Although the U.S. Supreme Court rejected the claim that the arbitrator's interpretation of the collective bargaining agreement violated public policy, the Court recognized:

> [A] court may not enforce a collective-bargaining agreement that is contrary to public policy. . . . If the contract as interpreted by [the arbitrator] violates some explicit public policy, we are obliged to refrain from enforcing it. . . . Such a public policy, however, must be well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."[20]

The Court extended that reasoning in *Misco, Inc.*,[21] in which a machine operator had been fired after marijuana was found in his home and in his vehicle parked in his employer's parking lot. An arbitrator ordered the employee reinstated with backpay, reasoning that the evidence did not establish that he had used or possessed marijuana on company property, in violation of company policy. The federal district court declined to enforce the award, and the Fifth Circuit affirmed the district court's conclusion that "reinstatement would violate the public policy 'against the operation of dangerous

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[20] *W.R. Grace & Co., supra* note 13, 461 U.S. at 766 (citations omitted).

[21] *Misco, Inc., supra* note 11.

machinery by persons under the influence of drugs or alcohol.' "[22]

The Court explained that "[a] court's refusal to enforce an arbitrator's award under a collective-bargaining agreement because it is contrary to public policy is a specific application of the more general doctrine, rooted in the common law, that a court may refuse to enforce contracts that violate law or public policy."[23] That doctrine derives from the basic notion that no court will lend its aid to one who founds a cause of action upon an immoral or illegal act, and the doctrine is further justified by the observation that the public's interests in confining the scope of private agreements to which it is not a party will go unrepresented unless the judiciary takes account of those interests when it considers whether to enforce such agreements.[24] In the common law of contracts, this doctrine has served as the foundation for occasional exercises of judicial power to abrogate private agreements.[25]

But, the Court cautioned, while a court may not enforce a collective bargaining agreement that is contrary to public policy, a court's refusal to enforce an arbitrator's interpretation of a collective bargaining agreement "is limited to situations where the

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[22] *Id.* at 35.

[23] *Id.* at 42.

[24] *Id.*

[25] *Id.*

contract as interpreted would violate 'some explicit public policy' that is 'well defined and dominant, and is to be ascertained "by reference to the laws and legal precedents and not from general considerations of supposed public interests."'"[26] Thus, the Court explained,

> [t]wo points follow from our decision in *W.R. Grace.*[27] First, a court may refuse to enforce a collective-bargaining agreement when the specific terms contained in that agreement violate public policy. Second, it is apparent that our decision in that case does not otherwise sanction a broad judicial power to set aside arbitration awards as against public policy. Although we discussed the effect of that award on two broad areas of public policy, our decision turned on our examination of whether the award created any explicit conflict with other "laws and legal precedents" rather than an assessment of "general considerations of supposed public interests." . . . At the very least, an alleged public policy must be properly framed under the approach set out in *W.R. Grace,*[28] and the violation of such a policy must be clearly shown if an award is not to be enforced.[29]

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[26] *Id.* at 43.

[27] *W.R. Grace & Co., supra* note 13.

[28] *Id.*

[29] *Misco, Inc., supra* note 11, 484 U.S. at 43.

Based on that holding, the Court concluded:

> [T]he formulation of public policy set out by the Court of Appeals did not comply with the statement that such a policy must be "ascertained 'by reference to the laws and legal precedents and not from general considerations of supposed public interests.'" . . . The Court of Appeals made no attempt to review existing laws and legal precedents in order to demonstrate that they establish a "well-defined and dominant" policy against the operation of dangerous machinery while under the influence of drugs. Although certainly such a judgment is firmly rooted in common sense, we explicitly held in *W.R. Grace*[30] that a formulation of public policy based only on "general considerations of supposed public interests" is not the sort that permits a court to set aside an arbitration award that was entered in accordance with a valid collective-bargaining agreement.[31]

The Court further explained that even if the Fifth Circuit's formulation of public policy was accepted, no violation of that public policy had been shown, because the marijuana found in the employee's home and car did not establish that his reinstatement violated a public policy against the operation of dangerous machinery by persons actually under the influence of drugs. That conclusion, the

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[30] *W.R. Grace & Co., supra* note 13.

[31] *Misco, Inc., supra* note 11, 484 U.S. at 44.

Court reasoned, rested on assumptions that were insufficient to support vacating the award and inconsistent with the factual findings made by the arbitrator.[32]

The Court elaborated upon those principles in *Eastern Associated Coal Corp.*,[33] in which the lower courts had refused to vacate an arbitration award ordering reinstatement of a truckdriver who had tested positive for marijuana. The Court framed the issue presented in the case as "not whether [the employee's] drug use itself violates public policy, but whether the agreement to reinstate him does so."[34] The Court agreed with the employer, "in principle, that courts' authority to invoke the public policy exception is not limited solely to instances where the arbitration award itself violates positive law."[35] But the Court reiterated that the public policy exception is narrow and must satisfy the principles explained in *W.R. Grace & Co.* and *Misco, Inc.*[36] And the Court reasoned that in the case before it, the employee's reinstatement was not contrary to public policy, because it was not unlawful despite a detailed statutory and regulatory scheme that represented a careful

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[32] *Id.*

[33] *Eastern Associated Coal Corp.*, *supra* note 19.

[34] *Id.* at 62-63.

[35] *Id.* at 63.

[36] *See W.R. Grace & Co.*, *supra* note 13, and *Misco, Inc.*, *supra* note 11.

determination of public policy by the legislative and executive branches.[37]

Although this court has not previously recognized the public policy exception to the enforcement of arbitration awards, the basic common-law contract principles upon which the Court relied in *Misco, Inc.*[38] are well established in Nebraska,[39] and other jurisdictions to have considered the question have taken an approach consistent with the U.S. Supreme Court's.[40]

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[37] *Eastern Associated Coal Corp., supra* note 19.

[38] *Misco, Inc., supra* note 11.

[39] *See, e.g., Lexington Ins. Co. v. Entrex Comm. Servs.*, 275 Neb. 702, 749 N.W.2d 124 (2008); *Stewart v. Bennett*, 273 Neb. 17, 727 N.W.2d 424 (2007); *Myers v. Nebraska Equal Opp. Comm.*, 255 Neb. 156, 582 N.W.2d 362 (1998); *Custer Public Power Dist. v. Loup River Public Power Dist.*, 162 Neb. 300, 75 N.W.2d 619 (1956).

[40] *See, e.g., Westmoreland v. Westmoreland Intermediate*, 595 Pa. 648, 939 A.2d 855 (2007); *In re Merrimack County (NH PELRB)*, 156 N.H. 35, 930 A.2d 1202 (2007); *NJ Turnpike Auth. v. Local 196*, 190 N.J. 283, 920 A.2d 88 (2007); *Metro. Police Dept. v. Public Employee*, 901 A.2d 784 (D.C.2006); *City of Boston v. Boston Police Patrolmen's*, 443 Mass. 813, 824 N.E.2d 855 (2005); *CVN Group, Inc. v. Delgado*, 95 S.W.3d 234 (Tex.2002); *Regional Transit Auth. v. Transit Union*, 91 Ohio St.3d 108, 742 N.E.2d 630 (2001); *State Corr. Officers & Pol. Benev. v. State*, 94 N.Y.2d 321, 726 N.E.2d 462, 704 N.Y.S.2d 910 (1999); *Buzas Baseball v. Salt Lake Trappers*, 925 P.2d 941 (Utah 1996); *State Auditor v. Minn. Ass'n of Pro. Emp.*, 504 N.W.2d 751 (Minn.1993); *Bureau of Maine State Police v. Pratt*, 568 A.2d 501 (Me.1989); *AFSCME v. State of Illinois*, 124 Ill.2d 246, 529 N.E.2d 534, 124 Ill.Dec. 553 (1988); *New Haven v. AFSCME, Council, Local 530*, 208 Conn. 411, 544 A.2d 186 (1988); *Amalgamated Transit Union v. MTA*, 305 Md. 380, 504 A.2d 1132 (1986).

We agree with those jurisdictions and likewise hold that a court may refuse to enforce an arbitration award that is contrary to a public policy that is explicit, well defined, and dominant.[41] Such a public policy must be ascertained by reference to laws and legal precedents, not from general considerations of supposed public interests, but the arbitration award need not itself violate positive law to be unenforceable as against public policy.[42]

With that established, we turn to a consideration of Henderson's relationship with the Ku Klux Klan and what it represents, and the Nebraska public policy concerns that relationship implicates.

HENDERSON'S AFFILIATION WITH KU KLUX KLAN

Henderson joined the Ku Klux Klan in 2004. In 2003, Henderson's wife had left him in favor of a Hispanic man, and an action for dissolution of marriage was filed. This led Henderson, in June 2004, to pay a $35 membership fee to join the Knights Party. Henderson admitted that the Knights Party is essentially the same entity as the Ku Klux Klan. A Knights Party application form, obtained by the State Patrol investigation, explained the Knights Party as follows:

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[41] *See Eastern Associated Coal Corp., supra* note 19.

[42] *See id.*

> The Knights Party is always looking for good men and women to associate with and work toward White Christian Revival.
>
> . . . The Knights' Party is not a secret society but rather a political movement, an alternative from the November Criminals of the Republican Party and Democrat Party.
>
> . . . .
>
> We are a political party building a strong foundation nation wide. We do not run candidates at this time so that all financial resources can be invested into the grass roots level – therefore we do not fall under the federal political party guidelines. Unlike the other political parties where they have to make public the names of contributors and associates. We do not. Your Klan association is kept strictly confidential.
>
> We are a Christian organization and in spite of what enemies of the Klan say or in spite of those who appear on talk shows who claim they are Klansmen and Klanswomen, we are nonviolent and won't allow such behavior. We are not opposed, however to self-defense only aggressive behavior.

On the application form, the applicant was asked to attest to the following:

> I am white and not of racially mixed descent. I am not married to a nonwhite. I do not date nonwhites no[r] do I have nonwhite dependents. I believe in the ideals of Western

> Christian civilization and profess my belief in Jesus Christ as the Son of God.
>
> I understand that The Knights Party is legal and law abiding and that I will never be asked to commit an unlawful act.
>
> . . . .
>
> I agree to follow the guidelines as set by headquarters to the best of my ability and to do what I am able to promote the interests of The Knights Party and its ultimate goal of political power and White Christian Revival.
>
> . . . .
>
> I understand I will be expected to be honest, ethical, sacrificing, dedicated, disciplined, and loyal.

And an attached letter from Knights Party National Director Thomas Robb, welcoming the applicant to the Knights Party, explained:

> The Knights prides itself on being the most professional and active pro-white movement in America and we also have Klansmen and Klanswomen throughout the world. Across the nation *we are recognized as the most devoted and experienced movement in the struggle for White rights, White Pride and White Power*! . . .
>
> . . . .
>
> Again, we welcome you as you start out on the journey to Knighthood. We pray that your decision to take this very important

> step was a decision based upon your desire to actively promote this most noble cause and not one of mere amusement. We take the problems that our people face very seriously and wish to Knight only the most dedicated and unselfish of individuals. We believe that you can be this type of person; *a Klansman of purpose, a Klansman of dedication, a Klansman of sacrifice, a Klansman of humility, and a Klansman of loyalty.* You joined the movement to make a difference. We trust you will not let our people, our faith, or our nation down. You have been given a great opportunity to make a real difference for our people. Let's make the most of it.
>
> White Victory!
>
> /s/
>
> Thomas Robb

(Emphasis in original.)

As a result of his application and payment of the fee, Henderson was issued a Knights Party membership card. The card read, in part:

> I pledge my loyalty. I will work for the preservation and protection of the White race. I understand Jesus Christ is our foundation and that we are not a secret army but men and women who proclaim the need of our people to put the true Christian faith in all areas of society, whether economic, judicial, social, educational, scientific, or political.

Henderson, under the user name "White knight in NE," posted messages in a Knights Party online discussion forum.[43] In a September 20, 2005, message, Henderson stated: "I'm the new guy from Nebraska. Just want to say hi. Hope everyone is doing good. Give me hints how this works. THANKS!!!!" And a few minutes later, Henderson posted the following:

> I have been in law enforcement 23 yrs. My fiancee has been working in TV news locally 8 yrs. A recent hired black anchor ie: they need people of color on the news desk, has been trying to get real friendly with her. But she has told him to leave her alone. She even complained to the higher up's. They told her not to cause trouble. So, I contacted him, the black anchor and told him the same thing. leave her alone. I was very polite and kind about it. He complained to my Capt. that I was harrassing him. I was found not to be thru and investigation done by IA. But I was told to not contact him any more by my Capt. My fiancee went to an atty. that specialize's in these matters. She was told the black card wins all the time. So she probably should start looking for another job, or just not say anything to anyone at work.

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[43] Because of the informal style of these messages, there are various grammar, spelling, and syntax errors. Indicating each error with a "[sic]" would be distracting, so we reproduce each of the messages in its original form.

> It is pretty bad when a person can not even complain about these things and they are told to stay away or not say anything. Over my 23 yrs in my job this sort of thing has been getting worse, not only at work, but also with suspects. Whites are losing there rights slowly. It's sad. I pray about it. I hope my prayers get answered. White knight in Ne.

Later that day, Henderson posted again: "Can someone put me in touch with others in the omaha, ne area that have the same beliefs that I do. God Country and Race. Your White Knight in Ne." After a response from another member suggested that Henderson contact "Headquarters," Henderson replied: "Thank you for your reply. I will contact them ie: HQ. I just feel like I'm fighting a up hill battle by myself here in NE. God bless. Your White Knight in Ne." A few days later, Henderson posted:

> I guess I was stupid when I asked to be put in touch with other members in Nebraska. I know evryone must be discreet. I especially need to be discreet because of my job ie: law enforcement. But if anyone wants to contact me, being discreet. You can contact me by e-mail [e-mail address redacted] or phone [telephone number redacted]. I'm in Omaha. If no one contacts me because or privacy I fully understand. Your White Knight in Ne.
>
> P.S. I especially would like to know other law enforcement people. As we would have alot in common.

Henderson reported that no one responded to his request for contact, and there is no evidence of any further participation by Henderson in Knights Party discussion or activities. Henderson resigned his membership in the Knights Party in an e-mail sent February 20, 2006 – after the State Patrol investigation had commenced, after the State Patrol investigator had concluded that the allegations against Henderson were well founded, and the day before the internal affairs conduct and procedures meeting that resulted in a recommendation that Henderson's employment be terminated.

KU KLUX KLAN

The Ku Klux Klan was founded in Pulaski, Tennessee, in 1865 or 1866, by former officers of the Confederacy.[44] It began as a social fraternity of pranksters, but was quickly transformed into a terrorist organization aimed to promote and preserve white supremacy.[45] In the post-Civil War South, under the leadership of a former Confederate general, Nathan Bedford Forrest, the Ku Klux Klan became a counterrevolutionary organization that "whipped, shot, hanged, robbed, raped, and otherwise outraged Negroes and Republicans across the South in the

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[44] *See Church of the Ku Klux Klan v. Kerik,* 356 F.3d 197 (2d Cir.2004). *See, also,* Allen W. Trelease, White Terror: The Ku Klux Klan Conspiracy and Southern Reconstruction (1971).

[45] *See, Kerik, supra* note 44; Trelease, *supra* note 44.

name of preserving white civilization."[46] The movement was from the start, and still is, highly decentralized, but "[t]he overriding purpose of the Ku Klux movement, no matter how decentralized, was the maintenance or restoration of white supremacy in every walk of life."[47]

The Ku Klux Klan was officially "disbanded" by Forrest when even he proved unable to control it, but local units continued to operate until sent into hiding by federal troops[48] empowered by federal legislation specifically enacted to combat the Ku Klux Klan.[49] It reorganized in 1915 and was extraordinarily successful due to a nascent civil rights movement, urbanization, northern migration of blacks, and immigration.[50] The movement fragmented again after the Second World War but gained new strength in the wake of *Brown v. Board of Education*[51] and in opposing the growing civil rights movement.[52] Between 1955 and

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[46] Trelease, *supra* note 44 at xi. *See, also, Kerik, supra* note 44.

[47] Trelease, *supra* note 44 at xlvi.

[48] Anti-Defamation League, Ku Klux Klan-History, http://www.adl.org/learn/ext_us/kkk/history.asp (last visited February 26, 2009).

[49] *See, generally, Virginia v. Black,* 538 U.S. 343, 123 S.Ct. 1536, 155 L.Ed.2d 535 (2003).

[50] *See id.*

[51] *Brown v. Board of Education,* 349 U.S. 294, 75 S.Ct. 753, 99 L.Ed. 1083 (1955).

[52] *See, generally, Black, supra* note 49; John George & Laird M. Wilcox, Nazis, Communists, Klansmen, and Others on the

(Continued on following page)

1965, the Ku Klux Klan or Ku Klux Klan sympathizers perpetrated more than 200 bombings and murdered 40 civil rights workers.[53] Although the Ku Klux Klan's threat has waned since, it has recently begun to regain strength by advancing an anti-immigrant message, much as it did during its heyday in the 1920's, when its meteoric rise was fueled by fear of Catholic European immigrants.[54] Over its long history, the Ku Klux Klan has always managed to rebuild.[55]

Nebraska has not been immune to the Ku Klux Klan's influence. The Ku Klux Klan began actively recruiting members in Nebraska in 1921.[56] Soon, the Ku Klux Klan claimed 45,000 members in Nebraska, and public demonstrations, parades, and cross burnings grew common.[57] The Ku Klux Klan was vigorous in its campaigns against blacks, Jews, foreigners, Catholics, and women suffragists.[58] Early resistance

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Fringe: Political Extremism in America (1992), citing George Thayer, The Farther Shores of Politics (1967).

[53] *KKK: Inside American Terror* (National Geographic Channel television broadcast Oct. 15, 2008).

[54] *See id.*

[55] *Id.*

[56] Michael W. Schuyler, *The Ku Klux Klan in Nebraska, 1920-1930,* 66 Nebraska History 234 (1985).

[57] *Id.*

[58] Kathryn Watterson, Not By The Sword: How the Love of a Cantor and His Family Transformed a Klansman (1995). *See, also,* Schuyler, *supra* note 56; Patricia A. Welker, *The Church in Two Diverse Communities During the 1920s: Guthrie Center,*

(Continued on following page)

from key political officials and newspapers, however, blunted the Ku Klux Klan's appeal in Nebraska, and "although it would linger in a number of communities well into the 1930s, [it] soon faded from the public scene."[59] But not before it divided communities with anger and hostility and engendered fear of violence among those that it targeted for exclusion.[60]

The Ku Klux Klan's history and notoriety give it, and its symbols, influence and meaning greatly disproportionate to its remaining membership. The Ku Klux Klan has been characterized as ""'[t]he world's oldest, most persistent terrorist organization.'""[61] There is little doubt that the Ku Klux Klan's main objective remains to establish a racist white government in the United States.[62] The Ku Klux Klan, like the burning cross that is its most dramatic and visible sign, is a symbol of organized violence, physical as well as verbal, directed against blacks.[63]

Iowa, Sidney, Nebraska, and a Pragmatic Minister, 44 Journal of the West 62 (2005).

[59] Schuyler, *supra* note 56 at 252.

[60] *See*, Schuyler, *supra* note 56; Welker, *supra* note 58.

[61] *See Black, supra* note 49, 538 U.S. at 388 (Thomas, J., dissenting), quoting M. Newton & J. Newton, The Ku Klux Klan: An Encyclopedia (1991). *See, also, KKK: Inside American Terror, supra* note 53.

[62] *See Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (Thomas, J., concurring).

[63] *Church of Amer., Ku Klux Klan v. City of Gary, IN,* 334 F.3d 676 (7th Cir.2003).

"[N]o single group more starkly demonstrates the endurance of dark social forces in the United States – racism, religious bigotry, extralegal vigilantism, moral authoritarianism – than the Klan, a hooded secret order now well into its second century of existence."[64]

Nor is there any doubt that the Knights Party is heir to the historical Ku Klux Klan. The Knights Party attempts to make itself respectable by presenting itself as representing Christian family values, and this approach has made it one of the largest traditional Ku Klux Klan groups operating today.[65] But the record establishes that the Knights Party, while it purports to discourage violence, expressly claims to be the Ku Klux Klan founded in Pulaski over 140 years ago and the Ku Klux Klan that marched in Washington, D.C., in the 1920's. The Knights Party invokes and claims the legacy of Nathan Bedford Forrest. The Knights Party uses the ceremonial robes and Celtic cross that have traditionally represented the Ku Klux Klan.[66] And the Knights Party invokes the same political views, declaring, "God gave the entire earth to be the white man and woman's domain. That is our purpose in

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[64] Shawn Lay, ed., The Invisible Empire in the West: Toward a New Historical Appraisal of the Ku Klux Klan of the 1920s at 1 (1992).

[65] *KKK: Inside American Terror*, *supra* note 53.

[66] *See Church of American Knights Ku Klux v. City of Erie*, 99 F.Supp.2d 583 (W.D.Pa.2000).

being here; to subdue and rule. Under our Christian guidance, all races will lead a much happier existence. Law and order is what they need."

The Knights Party claims to be nonviolent, and there is no evidence in the record that it is not. But it is also worth noting that while the Knights Party officially disclaims violence, distance from violence is a tactic that traditional Ku Klux Klan groups have used in the past.[67] It has been historically common for the Ku Klux Klan to publically deny that its movement has engaged in illegal activity, or even that it is racist or anti-Semitic.[68] Among the first prescripts of the Ku Klux Klan, dating to 1868, is a "formal statement of character and purpose" that proclaims the Ku Klux Klan to be "'an institution of Chivalry, Humanity, Mercy, and Patriotism" 'intended "'to protect the weak, the innocent, and the defenceless, from the indignities, wrongs, and outrages of the lawless, the violent, and the brutal'" and to support the U.S. Constitution and constitutional laws.[69] But despite that rhetoric, not dissimilar to that advanced by the Knights Party today,

> [i]t would be hard to imagine a greater parody than this on the Ku Klux Klan as it actually operated. It frequently pandered to

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[67] *KKK: Inside American Terror*, *supra* note 53.

[68] *See* Nancy MacLean, Behind the Mask of Chivalry: The Making of the Second Ku Klux Klan (1994). *See, also,* George & Wilcox, *supra* note 52.

[69] Trelease, *supra* note 44 at 16-17.

> men's lowest instincts; it bullied or brutalized the poor, the weak, and the defenseless; it was often the embodiment of lawlessness and outrage; . . . and it set at defiance the Constitution and laws of the United States.[70]

The Ku Klux Klan's public statements disavowing lawlessness have often been self-serving attempts to avoid prosecution for acts of violence.[71] But beyond that, even when technically true, they are not entirely compelling, given the nature of Ku Klux Klan ideology. As one historian has observed, the Ku Klux Klan provides "cultural sanction" for violence

> from each of the strands in the Klan's world view: its reactionary populism, its racialism, its gender conventions, and its overall alarm about the state of society and government. Together, they worked to prompt and ennoble white male violence undertaken in defense of family and community. To put it another way, there were no significant restraining elements in Klan culture that might act to inhibit violence against outsiders to Klansmen's idea of community.[72]

Stated another way, the Knights Party's attempt to disclaim violence is insufficient to excuse its continued endorsement of a historical legacy of violence,

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[70] *Id.* at 17.

[71] *See* MacLean, *supra* note 68.

[72] *Id.* at 150.

and the inevitably violent consequences of its hateful political and social propaganda. Given the history of the Ku Klux Klan, and the Knights Party's express claim to that history, we have little difficulty in concluding that for all practical purposes, joining the Knights Party is the same as joining the historical Ku Klux Klan. Nor is it difficult to conclude that the historical Ku Klux Klan represents discrimination, violence, and armed resistance to lawful authority.

NEBRASKA PUBLIC POLICY

The State of Nebraska was founded only a year or two after the Ku Klux Klan. Nebraska entered the Union on March 1, 1867, upon the "fundamental condition," imposed by Congress as a requirement for Nebraska's statehood, that "there shall be no denial of the elective franchise, or of any other right, to any person, by reason of race or color."[73] Among the first official acts of the newly assembled Nebraska Legislature was to transmit to the President of the United States its authenticated assent to that condition, so that the President could proclaim Nebraska's admission to the Union.[74] The principle that laws should be enforced without regard to race is, in this sense, not only a fundamental public policy of the State of Nebraska – it is *the most* fundamental public policy of

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[73] *See* Gen.Stat. ch. 1 (1873).

[74] *See id.*

the State, as the condition upon which Nebraska's admission to the Union depended.

That "fundamental condition," as an expression of public policy, is reflected throughout Nebraska law. The Nebraska Constitution provides that "[n]o person shall be . . . denied equal protection of the laws"[75] and, as recently amended, also provides that "[t]he state shall not discriminate against, or grant preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting."[76] And since 1867, this state's motto, expressed on the Great Seal of the State of Nebraska, has been "Equality Before the Law."[77]

More recent enactments reflect the same principles. Nebraska law expressly prohibits discrimination on the basis of race or religion in a variety of con texts, including public accommodations,[78] housing,[79] employment,[80] insurance,[81] borrowing and lending,[82]

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[75] Neb. Const. art. I, § 3.

[76] *Id.*, § 30(1).

[77] *See* Neb.Rev.Stat. § 84-501 (Reissue 2008).

[78] *See* Neb.Rev.Stat. §§ 20-132, 20-134, and 20-139 (Reissue 2007).

[79] *See* Neb.Rev.Stat. §§ 20-318 (Reissue 2007) and 76-1495 (Reissue 2003).

[80] *See* Neb.Rev.Stat. §§ 23-2531 (Reissue 2007), 48-1101 et seq. (Reissue 2004), and 81-1355 (Reissue 2008).

[81] *See* Neb.Rev.Stat. § 44-7510 (Reissue 2004).

[82] *See* Neb.Rev.Stat. § 45-1056 (Reissue 2004).

collective bargaining,[83] military procurement,[84] libraries,[85] and National Guard service.[86] The Legislature has also authorized cities and villages to enact their own antidiscrimination provisions.[87] Nebraska law expressly provides that "[a] person in the State of Nebraska has the right to live free from violence, or intimidation by threat of violence . . . regardless of his or her race, color, religion, ancestry, national origin, gender, sexual orientation, age, or disability"[88] and imposes enhanced criminal penalties upon those who violate those rights.[89]

It is the clearly established public policy of the State of Nebraska that the law should be enforced without discriminating based on the race of its citizens. It is for that reason that this court, pursuant to the administrative authority conferred upon it by the Nebraska Constitution,[90] has promulgated a Code of Judicial Conduct providing that a judge shall perform judicial duties without bias or prejudice.[91] Because *the appearance* of bias or prejudice is detrimental to the administration of justice, the code also provides that

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[83] *See* Neb.Rev.Stat. § 48-214 (Reissue 2004).

[84] *See* Neb.Rev.Stat. § 48-215 (Reissue 2004).

[85] *See* Neb.Rev.Stat. § 51-211 (Reissue 2004).

[86] *See* Neb.Rev.Stat. § 55-134 (Reissue 2004).

[87] *See* Neb.Rev.Stat. §§ 18-1724 and 20-113 (Reissue 2007).

[88] Neb.Rev.Stat. § 28-110 (Reissue 2008).

[89] *See* Neb.Rev.Stat. § 28-111 (Reissue 2008).

[90] *See* Neb. Const. art. V, § 1.

[91] *See* Neb.Code of Judicial Conduct § 5-203(B)(5).

> [a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so.[92]

And because membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired, a judge "shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin."[93]

But the most direct expression of the importance of ensuring *that citizens perceive* law enforcement to be free of discrimination is Nebraska's racial profiling act.[94] The act explains, "Racial profiling is a practice that presents a great danger to the fundamental principles of a democratic society. It is abhorrent and cannot be tolerated."[95] The act prohibits police, expressly including a member of the State Patrol, from engaging in racial profiling[96] and requires law enforcement agencies, including the State Patrol, to

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[92] *See id.*

[93] *See* Neb.Code of Judicial Conduct § 5-202(C).

[94] *See* Neb.Rev.Stat. § 20-501 et seq. (Reissue 2007).

[95] § 20-501.

[96] § 20-502.

adopt a written policy prohibiting the practice.[97] And it imposes requirements intended to measure and prevent the practice of racial profiling.[98]

The act is particularly pertinent because of the determination of public policy that led to its enactment. As the senator introducing the measure to the Legislature explained, "[t]he problem is that regardless of whether there is racial profiling in Nebraska or not, there is the perception of unfairness."[99] The executive director of the Nebraska Equal Opportunity Commission, testifying in support of the legislation, agreed that "we must admit that there is a perception, and I use the word perception loosely because actually, it's more than a perception, that some officers are engaging in racial profiling, and this has created resentment and distrust of the police, particularly in communities of color."[100] And the chairperson of the Judiciary Committee explained that "[t]he people of Nebraska greatly appreciate the hard work and dedication of law enforcement officers in protecting the public" and that "[t]he good name of these officers should not be tarnished by the actions of

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[97] § 20-504.

[98] *See* § 20-501 et seq.

[99] Floor Debate, L.B. 593, 97th Leg., 1st Sess. 7954 (May 22, 2001).

[100] Judiciary Committee Hearing, L.B. 593, 97th Leg., 1st Sess. 13 (Mar. 7, 2001).

those few who commit discriminatory practices."[101] As the introducing senator explained,

> Nebraska has always been a diverse state with an immigrant background. Our heritage and disposition has been that of being inclusive and accepting [in] nature. This is one of the greatest traits of our state. That's why I believe it's important to present an open, fair law enforcement image for our state. . . . The problem that we have, regardless of whether there's racial profiling existing in Nebraska or not, [is that] we have the perception of unfairness. Because of that perception, many people who are stopped for a legitimate reason may think that they're being stopped [or] targeted due to their race. We need to collect data to determine whether the racial profiling does exist in our state, and to remove the perception of unfairness that we have.[102]

Taken as a whole, this authority evidences an explicit, well-defined, and dominant public policy of the State of Nebraska that is as old as the State itself: that the laws of Nebraska should be enforced without racial or religious discrimination. But more importantly, this public policy incorporates, and depends upon, the public's reasonable perception that the laws are being enforced without discrimination. And the Legislature's determination in that regard

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[101] Floor Debate, *supra* note 99 at 7955.

[102] Judiciary Committee Hearing, *supra* note 100 at 2.

makes sense. Under our system of government, the duty of law enforcement can be performed effectively only with the consent of the vast majority of those citizens policed. Efficient law enforcement requires mutual respect, trust, and support.[103] As the Supreme Judicial Court of Massachusetts has persuasively explained,

> "One of the most important police functions is to create and maintain a feeling of security in communities. To that end, it is extremely important for the police to gain and preserve public trust, maintain public confidence, and avoid an abuse of power by law enforcement officials." . . . "The image presented by police personnel to the general public . . . 'also permeates other aspects of the criminal justice system and impacts its overall success.' "[104]

We agree, and we hold that Nebraska public policy precludes an individual from being reinstated to serve as a sworn officer in a law enforcement agency if that individual's service would severely undermine reasonable public perception that the agency is uniformly committed to the equal enforcement of the law and that each citizen of Nebraska can depend on law enforcement officers to enforce the law without regard to race. We emphasize that this public

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[103] *McMullen, supra* note 14. *See, also, Weicherding, supra* note 14.

[104] *City of Boston, supra* note 40, 443 Mass. at 819-20, 824 N.E.2d at 861 (citation omitted).

policy is only implicated by behavior of the gravest nature. But we find that Henderson's knowing and willing affiliation with the Ku Klux Klan is such behavior.

HENDERSON'S REINSTATEMENT VIOLATES NEBRASKA PUBLIC POLICY

The State Patrol argues that the arbitration award violates public policy because it requires the State Patrol "to employ as a law enforcement officer an individual who has voluntarily associated himself with the [Ku Klux Klan] and the principles it espouses – arguably the most reviled, feared, violent, and racist organization in this country's history."[105] The State Patrol concludes that requiring Henderson's reinstatement "ignores the reality that a law enforcement officer who embraces a creed of racial bias and racial superiority breeds distrust, fear, and apprehension among members of the public [and] raises concerns among the public that his employer and fellow officers may harbor similar beliefs."[106] We agree.

Given the Ku Klux Klan's history, any choice to join that organization is a choice to associate with a symbol of violence and terrorism. We also note that Henderson's membership in the Knights Party is consistent with a long-established Ku Klux Klan

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[105] Brief for appellees at 30.

[106] *Id.* at 38, 824 N.E.2d 855.

strategy of recruiting and publicizing the membership of law enforcement officers. The Ku Klux Klan has historically enrolled or enlisted the support of law enforcement officers, to stave off indictment when victims of violence, "having recognized law enforcement officials among their assailants, understandably believed prosecution futile."[107] Consistent with that strategy, Henderson's continued service as a sworn employee of the State Patrol would directly advance the interests of the Ku Klux Klan by fostering the perception that some citizens of Nebraska do not enjoy the same protection by law enforcement as others.

We recognize that Henderson was not an overly active member of the Ku Klux Klan. But this was not a case of, as Henderson contended at oral argument, merely "getting on the wrong web site at the wrong time." It is beyond dispute that he willingly joined the Knights Party, knowing that he was effectively joining the Ku Klux Klan. In joining, he endorsed a point of view that is completely antithetical to the principles of Nebraska law that he was bound by oath to enforce. He provided direct financial support for the Ku Klux Klan's racist activities. And his membership has provided the Ku Klux Klan with valuable publicity and propaganda.

The fact is that Henderson chose to associate himself with the Ku Klux Klan and everything that

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[107] MacLean, *supra* note 68 at 170.

the Ku Klux Klan represents – a legacy of hatred, bigotry, violence, and terror that is utterly inconsistent with the responsibilities of a member of the Nebraska State Patrol. One cannot simultaneously wear the badge of the Nebraska State Patrol and the robe of a Klansman without degrading what that badge represents when worn by *any officer*.

Although arbitration decisions are given great deference, they are not sacrosanct.[108] Here we cannot say that the strong public policy favoring arbitration should trump the explicit, well-defined, and dominant public policy that laws should be enforced without racial or religious discrimination, and the public should reasonably perceive this to be so. Having associated himself with the Ku Klux Klan, Henderson's return to duty would involuntarily associate the State Patrol with the Ku Klux Klan and severely undermine public confidence in the fairness of law enforcement and the law itself. Therefore, we conclude that the arbitrator's decision reinstating Henderson to the Nebraska State Patrol violates Nebraska public policy and that the district court correctly refused to enforce the award. Henderson and SLEBC's assignment of error lacks merit.

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[108] *City of Boston*, *supra* note 40.

CONCLUSION

For the foregoing reasons, the decision of the district court is affirmed.

Affirmed.

HEAVICAN, C.J., not participating.

WRIGHT, J., not participating in the decision.

STEPHAN, J., dissenting.

To most people, it would seem patently obvious that the termination of Robert Henderson's employment with the Nebraska State Patrol was justified because his membership in the Knights Party, an affiliate of the Ku Klux Klan, reflects negatively on the State Patrol and could impair its operations or efficiency. But that is not what the arbitrator concluded. While I share the majority's doubt that the arbitrator decided this case correctly, I respectfully disagree with its conclusion that the narrow public policy exception to binding arbitration bars judicial enforcement of the award.

As the majority acknowledges, judicial review of an arbitration award is severely circumscribed.[1] We have noted:

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[1] *See Jones v. Summit Ltd. Partnership Five*, 262 Neb. 793, 635 N.W.2d 267 (2001).

> Appellate review of an arbitrator's award is necessarily limited because "to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all – the quick resolution of disputes and the avoidance of the expense and delay associated with litigation." . . . "[S]trong deference [is] due an arbitrative tribunal." . . . Furthermore, "'[w]hen . . . parties [agree] to arbitration, they [agree] to accept whatever reasonable uncertainties might arise from the process.'"[2]

Arbitration is not a judicial proceeding; it is purely a matter of contract.[3] Because parties to a collective bargaining agreement have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, "it is the arbitrator's view of the facts and of the meaning of the contract that they have agreed to accept. Courts thus do not sit to hear claims of factual or legal error by an arbitrator as an appellate court does in reviewing decisions of lower courts."[4] "[I]mprovident, even silly," factfinding by an

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[2] *Id.* at 798, 635 N.W.2d at 271 (citations omitted).

[3] *See, Cornhusker Internat. Trucks v. Thomas Built Buses,* 263 Neb. 10, 637 N.W.2d 876 (2002); *Kelley v. Benchmark Homes, Inc.,* 250 Neb. 367, 550 N.W.2d 640 (1996), *disapproved on other grounds, Webb v. American Employers Group,* 268 Neb. 473, 684 N.W.2d 33 (2004).

[4] *Paperworkers v. Misco, Inc.,* 484 U.S. 29, 37-38, 108 S.Ct. 364, 98 L.Ed.2d 286 (1987).

arbitrator does not permit a court to set aside an award.[5]

In this case, the arbitrator found that Henderson was fired not "because of his actions on the job," but, rather, "because of his beliefs and because he sought out others who shared his beliefs." The arbitrator determined that "the antagonism [Henderson] seems to feel towards non-white racial groups has never reared its ugly head on the job" and that the State Patrol "was not able to point to a single instance on the job" where Henderson's actions "exhibited any hatred, anger, disgust, or discrimination towards any minority group." The arbitrator found, based on the State Patrol's own data, that Henderson conducted traffic stops "in a race-neutral manner." The arbitrator found that while Henderson

> may have personal philosophies that would disgust many citizens of Nebraska, nevertheless, he has well-hidden those beliefs and they have not interfered with his impartial enforcement of the law. The Arbitrator has been persuaded that, to just about anyone he knows or interacts with professionally, [Henderson] projects himself as "an example of stability, fidelity and morality." Furthermore, there is no evidence or credible testimony that [Henderson's] affiliation with the Knight's Party/KKK impaired "the operation or efficiency of the State Patrol or the employee" or

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[5] *Id.* at 39.

> that his reinstatement will likely impair "the operation or efficiency of the State patrol or the employee."

Based upon the record made during a 12-hour hearing, the arbitrator concluded that "the State Patrol violated the Constitution, the Contract, and its own policies and procedures" when it discharged Henderson. In a finding particularly relevant to the issue before this court, the arbitrator stated:

> It is very likely that, under [several] decisions of the United States Supreme Court, the State Patrol could have successfully defended the constitutionality of its decision to terminate [Henderson] by either showing some actual harm to its ability to maintain discipline and good order within the ranks, or by showing some actual diminution in the State Patrol's ability to perform its police function.
>
> That said, the State Patrol bore the burden of showing such disruptions, and the Patrol failed to meet this burden. In the final analysis, all that the Agency presented to the Arbitrator was surmise and speculation that some operational or community-relations harm could occur; this was precious little upon which to hang the "hat" of deciding to terminate [Henderson].

The arbitrator also found that the State Patrol failed to show "any minimally-persuasive evidence that [Henderson's] actions or beliefs would cause disruptions in [Henderson's] ability to effectively

work with the Patrol's black Troopers, or that [Henderson's] actions or beliefs would cause the Patrol difficulties with respect to the morale, efficiency, or good order of the State Patrol."

As much as we may disagree with these findings, we are bound by them under well-established principles of arbitration law. I agree with the majority that in deciding whether the arbitrator's award should be enforced, our focus is solely on the remedy, which in this case is an order of reinstatement. To paraphrase *Eastern Associated Coal Corp. v. Mine Workers,*[6] the issue presented is not whether Henderson's conduct violated public policy, but whether the enforcement of the arbitration award requiring his reinstatement would do so.

The majority correctly states that it is the "public policy of the State of Nebraska that the law should be enforced without discriminating based on the race of its citizens." But in light of the arbitrator's factual findings, Henderson's reinstatement would not, in and of itself, automatically result in racial profiling or some other form of discriminatory law enforcement. The mere fact of Henderson's reinstatement, without more, would not violate any constitutional or statutory provision making racial discrimination unlawful. Only some unlawful conduct committed by Henderson *after* reinstatement could violate such laws and the

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[6] *Eastern Associated Coal Corp. v. Mine Workers,* 531 U.S. 57, 121 S.Ct. 462, 148 L.Ed.2d 354 (2000).

public policy upon which they are based. And it cannot be said on this record that such conduct is even likely, given the arbitrator's finding that despite his personal beliefs, Henderson has never breached his duty to enforce the law fairly and impartially in the past. With respect to his future conduct, Henderson would be bound by his oath to enforce the law fairly and in a nondiscriminatory manner, and he would be subject to the same civil and criminal liabilities as any other public officer if he failed to do so.[7]

The majority reasons that the public policy of nondiscriminatory law enforcement "incorporates, and depends upon, the public's reasonable perception that the laws are being enforced without discrimination." It then accepts the State Patrol's argument that a law enforcement officer with Henderson's affiliations "'breeds distrust, fear, and apprehension among members of the public [and] raises concerns among the public that his employer and fellow officers may harbor similar beliefs.'" Were we deciding this issue in the first instance, I would agree. But our review requires that we give deference to the findings of the arbitrator, and the conclusion reached by the majority necessarily rejects the arbitrator's specific finding that Henderson's past affiliation had not and would not impair the mission of the State Patrol. By defining public policy so broadly as to incorporate public

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[7] *See*. 18 U.S.C. § 242 (2006); 42 U.S.C § 1983 (2000); Neb.Rev.Stat. § 20-148 (Reissue 2007).

perception of possible future harm, the majority has simply upheld the State Patrol's initial determination that Henderson's affiliation with the Knights Party reflected negatively on the State Patrol and brought the Patrol into disrepute. While this may seem perfectly logical, it necessarily repudiates the arbitrator's findings that Henderson's personal affiliations and beliefs, however reprehensible, have not affected his ability or that of the State Patrol to fairly and impartially enforce the law.

Reasoning similar to that of the majority in this case was explicitly rejected by the Supreme Court in *Paperworkers v. Misco, Inc.*[8] That case involved a machine operator who was apprehended in the back seat of a car that was parked on the employer's premises. There was marijuana smoke in the vehicle and a lighted marijuana cigarette in the front seat ashtray. The employee did not own the car. The employee was discharged for violating rules prohibiting the possession of drugs on company premises, and the matter was submitted to arbitration. The arbitrator determined that there was no proof that the employee had actually possessed marijuana on company property and, thus, that there was no just cause for the discharge. The arbitrator ruled the employee was entitled to reinstatement with full seniority and backpay. A federal district court refused to enforce the award on public policy grounds, and an appeals court

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[8] *Paperworkers v. Misco, Inc., supra* note 4.

affirmed, concluding that reinstatement would violate the public policy against operation of dangerous machinery by persons under the influence of drugs or alcohol. The Supreme Court determined that while this judgment was "firmly rooted in common sense," it did not justify refusal to enforce the award.[9] The Court held that the appeals court had improperly drawn inferences from the facts, and it stressed that whether the employee "had ever been or would be under the influence of marijuana while he was on the job and operating dangerous machinery is an exercise in factfinding" which was the arbitrator's function, not the appellate court's.[10] The Supreme Court made it very clear that even an inquiry into a "possible violation of public policy" does not "excuse a court for doing the arbitrator's task,"[11] noting:

> Had the arbitrator found that [the employee] had possessed drugs on the property, yet imposed discipline short of discharge because he found as a factual matter that [the employee] could be trusted not to use them on the job, the Court of Appeals could not upset the award because of its own view that public policy about plant safety was threatened.[12]

With respect to Henderson, the majority here is doing precisely what the Supreme Court prohibited.

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[9] *Id.* at 44.

[10] *Id.* at 44-45.

[11] *Id.* at 45.

[12] *Id.*

The arbitrator's findings in this case are similar to those considered by a New York appellate court in *State Corr. Officers & Pol. Benev. v. State.*[13] There, a correctional officer was suspended from duty for flying a Nazi flag from the front porch of his home on the 55th anniversary of Adolph Hitler's declaration of war on the United States. Several newspapers through-out the state reported the event. The department of correctional services charged the officer with violating rules prohibiting off-duty conduct which would "'reflect discredit upon the Department or its personnel'" and prohibiting an officer from affiliating with groups having interests which would "'interfere with the impartial and effective performance'" of the officer's duties.[14] The suspension was submitted to arbitration, and the arbitrator found no nexus between the officer's off-duty misconduct and his employment, noting the absence of "evidence that his conduct harmed the Department's business, adversely affected [the officer's] ability to perform his job, or caused co-workers not to work with him."[15] The arbitrator concluded that the projection of possible harm, as opposed to actual harm, was not sufficient to permit restriction of the officer's symbolic free speech or regulation of his off-duty conduct.

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[13] *State Corr. Officers & Pol. Benev. v. State,* 94 N.Y.2d 321, 726 N.E.2d 462, 704 N.Y.S.2d 910 (1999).

[14] *Id.* at 324-25, 726 N.E.2d at 464, 704 N.Y.S.2d at 912.

[15] *Id.* at 325, 726 N.E.2d at 465, 704 N.Y.S.2d at 913.

The court rejected the department's request that the arbitration award be vacated on public policy grounds. It noted that it was bound by the arbitrator's decision unless it could determine that the award violated public policy in the form a "well-defined constitutional, statutory or common law of this State."[16] It concluded that because neither state statutes, regulations, nor the employee manual "proscribes the reinstatement of an employee who engaged in conduct as established here but who nevertheless is found *not guilty* of the charges as submitted to the arbitrator,"[17] it could not vacate the award as violative of public policy. The court noted that "[a]s abhorrent as [the officer's] personal conduct is, Judges cannot reject the factual findings of an arbitrator simply because they do not agree with them."[18] The court also rejected the department's request that it apply a balancing test to determine that the officer's right to freedom of expression was outweighed by the governmental interest in the safe and efficient operation of the correctional facility, concluding

> [t]o do so . . . would require us to invade the province of the arbitrator under the guise of public policy, and to reexamine and redetermine the merits of the case. By submitting the issue of [the officer's] conduct to

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[16] *Id.* at 328, 726 N.E.2d at 467, 704 N.Y.S.2d at 915.

[17] *Id.*

[18] *Id.*

> arbitration, the parties placed upon the arbitrator the responsibility of passing on the implications of [his] offensive conduct under the collective bargaining agreement. We must honor the choice of the parties to have their controversy decided in that forum.[19]

In my view, the majority has rejected the findings of the arbitrator and redecided the merits of this case under the guise of public policy. I could accept the reasoning of the majority that Henderson's reinstatement would foster "the perception that some citizens of Nebraska do not enjoy the same protection by law enforcement as others" if the arbitrator had made any findings that Henderson's affiliation with the Knights Party affected the performance of his duties, because in that circumstance there would be a factual basis upon which to conclude that Henderson could not be trusted with the duties and responsibilities of law enforcement.[20] But the arbitrator actually made specific affirmative findings that Henderson's beliefs "have not interfered with his impartial enforcement of the law," and it is therefore entirely speculative to conclude that the public would have a contrary perception if he were reinstated.

In concluding that Henderson's reinstatement would violate public policy by creating a public perception of discriminatory law enforcement, the

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[19] *Id.*

[20] *See City of Boston v. Boston Police Patrolmen's,* 443 Mass. 813, 824 N.E.2d 855 (2005).

majority disregards the following provision of the award specifically designed to prevent or mitigate any such perception:

> Nothing in this Award shall prevent the Nebraska State Patrol from reassigning [Henderson] in the future, if necessary to maintain the good order and efficiency of the Agency, or to eliminate/mitigate actual civil disruptions that may occur as a result of the public becoming aware of [Henderson's] association with the Knight's [sic] Party, Christian Concepts, the Ku Klux Klan, or any other such group[.]

Henderson's counsel acknowledged at oral argument that if the award were enforced and Henderson were reinstated, the State Patrol "could assign him to the supply division. They could [assign] him to communications. They could have him cleaning out desks for the next three or four years if they wished to do that." Other courts, including the Supreme Court, have considered the flexibility of an arbitral award of reinstatement in considering whether it violated public policy. In *Misco, Inc.*,[21] where the machine operator charged with marijuana use was ordered reinstated to his old position or an equivalent one for which he was qualified, the Supreme Court noted that the employer had not established that he "would pose a serious threat to the asserted public policy in

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[21] *Paperworkers v. Misco, Inc., supra* note 4.

every job for which he was qualified."[22] Similarly, the Eighth Circuit Court of Appeals held that an arbitration award requiring reinstatement of an employee who had breached safety regulations at a liquid natural gas storage facility did not violate public policy where it permitted reassignment to a different, less-sensitive position in which safety concerns were not implicated.[23]

Finally, I am concerned that the majority understates the significance of the arbitrator's finding that Henderson's discharge violated his First Amendment rights. Again, while we may disagree strongly with this finding, we are bound by it in the procedural posture of this case. That being so, the result reached by the majority necessarily implies that it is willing to ignore the State's violation of Henderson's constitutional rights because if he were reinstated, the public may *perceive* that he may violate someone else's rights in the future, despite the arbitrator's specific findings that he has never done so in the past. In my view, this apparent subordination of individual constitutional rights to the "greater good" poses a far greater risk of harm to the public policy of this state than reinstating one misguided trooper and reassigning him to some mundane position well behind the front lines of law enforcement, where he would pose no actual or reasonably perceivable threat to the

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[22] *Id.* at 45.

[23] *Midamerican Energy v. Intern. Broth. of Elec.*, 345 F.3d 616 (8th Cir.2003).

mission of the State Patrol or the welfare of the public it serves.

In summary, while I disagree with many of the arbitrator's factual findings and legal conclusions and share the majority's revulsion toward Henderson's affiliation with the Knights Party and everything that organization stands for, I cannot conclude that the award of reinstatement would violate public policy under the restrictive standard prescribed by the U.S. Supreme Court in *W.R. Grace & Co. v. Rubber Workers*[24]; *Misco, Inc.*[25]; and *Eastern Associated Coal Corp.*[26] I therefore respectfully dissent.

CONNOLLY, J., joins in this dissent.

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[24] *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 103 S.Ct. 2177, 76 L.Ed.2d 298 (1983).

[25] *Paperworkers v. Misco, Inc.*, *supra* note 4.

[26] *Eastern Associated Coal Corp. v. Mine Workers*, *supra* note 6.

State of Nebraska, Employee Relations Division – DAS

In the matter of the arbitration between the State Law Enforcement Bargaining Council And State of Nebraska, Nebraska State Patrol	Opinion and Award

Grievance of: Trooper Robert Henderson – Discharge

Appearances:

For the Union:

Angle, Murphy, Valentino & Campbell, PC
By: Vincent Valentino, Esq.

For the State:

Frederick R. King, Esq., Agency Counsel

Before: Paul J. Caffera, Arbitrator

I. *Procedure*:

Pursuant to the procedure for arbitration contained in the collective bargaining agreement ("CBA," "Contract," "Labor Agreement"), covering the period July 1, 2005 through June 30, 2007 between the State of Nebraska (the "State," the "Employer") and the State Law Enforcement Bargaining Council ("SLEBC," the "Union"), the undersigned was appointed under the rules of the State of Nebraska, Department of Administrative Services to arbitrate the above-captioned matter.

On June 2, 2006, the Arbitrator conducted a twelve-hour Hearing, at the Nebraska State

Patrol Traffic Office in Lincoln, Nebraska, at which both parties were afforded full opportunity to present testimony, examine and cross-examine witnesses, and to offer evidence and argument in support of their respective positions. The parties chose to make their post-hearing summations via written briefs. After receiving the parties' briefs, the exhibits and Hearing transcript from the reporting service, and a number of additional clarifying stipulations from the parties, the Arbitrator declared the Record closed on July 8, 2006. Given the quantity of exhibits, the length of the transcript, and size of the post-hearing submissions, the parties granted the Arbitrator an extension of the usual thirty- (30) day limit for issuing his Award.

II. *The Issue*:

The issue for determination, as stipulated by the parties, is as follows:

Did the Nebraska State Patrol violate the Collective Bargaining Agreement or its own operating procedures or policies when it disciplined the Grievant, Robert Henderson, on March 15, 2006? If so, what shall be the remedy?

III. *Remedy*:

The Union seeks to have the Grievant's discharge overturned, and the Grievant made whole.

IV. *Relevant Contract Provisions*:

Article 4 – Management Rights

* * *

4.1 *Retention of Rights*

4.1.1 All Management rights, functions, responsibilities, and authority not specifically limited by the express terms of this Agreement are retained by the Employer and remain exclusively within the rights of the Employer. No right enumerated herein shall be exercised or enforced in a manner contrary to or inconsistent with the provisions of this Agreement unless action is required per Article 30.[1]

* * *

4.2 *Certain Rights Specified*

4.2.1 These rights, powers, and authority of the State included, but are not limited to, the following:

1. The right to determine, effectuate, and implement the objectives and goals of the State.

* * *

5. The right to hire, examine, promote, train, transfer, assign, and retain bargaining unit members; suspend, demote, discharge, or take other

---

[1] Article 30 addresses civil-emergency situations: "In the event that the Agency Director determines that civil emergency conditions exist, the Agency Director may take whatever reasonable actions may be necessary to carry out the missions of the State in said situations of emergency."

disciplinary action against bargaining unit members for just cause. . . .

* * *

9. The right to adopt, modify, change, enforce, or discontinue any existing rules, regulations, procedures, and policies which are not in direct conflict with any provision of this Agreement.

* * *

Article 16 – Policy Changes and Personnel Records

16.1 *Policies and Procedures*

16.1.1 The Agencies may prepare, issue, and enforce policies, procedures, and safety regulations necessary for the safe, orderly, and efficient operation of the agency which shall not conflict with the terms of this agreement.

* * *

Article 29 – Disciplinary Rights and Procedures and Investigatory Suspension (State Patrol Only)

29.1.1 Except as otherwise specifically provided herein, the Employer shall conduct all disciplinary matters in conformance with due process as provided for in this labor contract. Disciplinary action shall include one of the following:

1. written warning

2. disciplinary probation

3. suspension

4. demotion

5. reduction in pay

6. discharge

Except that disciplinary probation may be used in conjunction with any of the forms of discipline except written warning and discharge.

Demotion and reduction in pay may also be used as a combination for disciplinary purposes.

29.1.2 Disciplinary actions shall be based upon good faith for just cause for violations of:

A. policies and procedures of the agency,

B. this agreement

* * *

29.2 Imposition of Discipline

29.2.1 When imposing discipline, management shall not take into consideration any prior discipline which is more than twenty-four (24) months old in determining the appropriate level of discipline. Disciplinary action will not be instituted against a bargaining unit member when the alleged misconduct is or could have been discovered with reasonable diligence within twelve (12) months from the date of

alleged misconduct unless the offense would constitute a Class IV felony or higher grade of felony.

29.2.2 All complains (sic) alleging misconduct of less than serious nature which are received more than ninety (90) days after the alleged incident took place, shall not result in discipline to the officer.

29.2.3 The parties agree that the progressive discipline techniques will be used. The goal of progressive discipline is to apply the minimum level of discipline which will bring the employee's performance to the expected level.

29.3 Due Process

29.3.1 Discipline shall be conducted in accordance with due process, as provided for in this labor contract, and good faith for just cause.

* * *

29.5 Disciplinary Suspension

* * *

29.5.4 When the Employer determines that an employee must be removed from a current work assignment pending the completion of an investigation and the administrative processing of the case . . . the Employer may:

a. Reassign the employee to another work assignment at their current rate of pay until the investigation is completed

b. Suspend the employee from work without pay until the investigation is completed or until twenty (20) work days have elapsed, whichever occurs first. However, the investigation may continue after the suspended employee returns to a paid status. The Employer agrees to pay the Employer's portion for group insurance during the period of suspension without pay.

c. Suspend the employee from work with pay until the investigation is completed. The status of an employee suspended with pay may subsequently be changed to a reassignment under Section 29.5.4(a) or a suspension without pay subject to the twenty (20) work day limitation in 29.5.4(b) if the investigation circumstances warrants such a change in status.

* * *

29.7 Procedures and Safeguards

29.7.1 The Agency may conduct investigations to discover the facts and circumstances surrounding any complaint, allegation, or suspicion or wrongdoing by a bargaining unit member. However, the Agency will take precautions to protect the rights and privacy of personnel being investigated.

29.7.2 Investigations conducted by the Agency will not knowingly commit any act which would deprive the bargaining unit member of any statutory or constitutional rights or privileges.

29.7.3 The Employer will provide the employee with copies of all personnel orders pertaining to bargaining unit members as soon as the personnel orders are issued. As used in this section "personnel orders" shall be defined as all written notices of actual disciplinary actions (notices of intent to take disciplinary actions), transfer notices, promotion notices and termination notices.

29.7.4 An employee under investigation may be interviewed by an investigator for Internal Affairs or by a supervisor assigned to investigate as to a matter under investigation. The employee may be compelled to provide information concerning the complaint or allegation of wrongdoing against him/her. Garrity warnings shall be given in all appropriate circumstances on the form. . . . * * *

29.7.4.1 A bargaining unit member shall be required to answer only those questions specifically relating to such member's duties and responsibilities within the scope of his/her employment, and acts or conduct (on or off the job) which adversely affect's the employee's performance and/or

the employing agency's performance or function. * * *

29.7.4.2 Prior to such interview the employee or his/her representative shall be given the right to review all existing reports contained in the case file that forms the basis for the requested interview, including copies of any Complaint Control Form (NSP 801 and 801A) but excluding documents containing confidential or privileged information, at least forty-eight (48) hours prior to such interview. The employee may waive notice and access to the reports.

29.7.4.3 "Confidential or privileged" as used herein shall refer to the name or identity of a person providing information about an employee to the Agency and who otherwise fits within the definition of Chapter 27 of the Nebraska State Statutes. * * *

* * *

29.8 Citizen Complaint

29.8.1 Citizens' complaints shall not be investigated unless a Complaint Control Form (NSP 801), or applicable agency form has been completed and all provisions of the Agency's Policies and Procedures are complied with. A copy of said Complaint Control Form will be provided to the affected bargaining unit member in compliance with Section 29.9.3 hereof unless

previously provided. The notice shall be in the form of an NSP 801 & 801A or current form showing alleged violations of policy.

29.8.2 NSP 801A shall contain a list of policy and procedure violations which is limited to those provisions which are clearly, in good faith, relevant to the alleged misconduct.

29.9 Disciplinary Process

29.9.1 A decision of an employee's appropriate supervisor to forward an allegation of misconduct to the Director or designee shall result in the appropriate supervisor not having further decision making involvement into such investigation although the supervisor may make recommendations as to the appropriate discipline to be administered.

29.9.2 Upon completion of the investigation, the completed investigatory file shall be sent to an impartial supervisor along with a recommendation as to whether the allegations appear to be founded or unfounded, This supervisor shall be unconnected to the investigation, outside of the bargaining unit, and not a witness, investigator for Internal Affairs, complainant. The supervisor shall normally be the Troop or Division Commander, or his/her designee, of the employee whose conduct is under investigation. If the recommendation is that the case is founded, the supervisor

will schedule a Conduct and Procedures Review Meeting.

29.9.3 A bargaining unit member scheduled for a Conduct and Procedures Review Meeting shall be notified, in writing, at least fourteen (14) calendar days in advance of the meeting. * * *

* * *

29.9.7 The Internal Affairs investigation shall be conducted and submitted to the Agency Director within forty-five (45) calendar days of receipt of the complaint at State Headquarters. The final decision on the matter will be given to the affected employee within a total of sixty (60) calendar days of receipt of the complaint at State Headquarters. EXCEPTIONS – Both parties recognize that the complexity and seriousness of allegations require a complete, thorough, and impartial investigation. In order to accomplish this, protect the employee's and the organization's interests, exceptions to the time limits may be necessary (emphasis original). Should an extension be required, the following steps shall be taken:

1. Internal Affairs (or appropriate investigating officer) will request an extension in writing to the Director specifying the reasons.

2. The employee shall receive a copy of such request for extension.

3. The Employee shall receive a copy of the approved extension.

* * *

V. *Relevant SOPs*:

SOP 03-08-01 Disciplinary Procedures – Code of Conduct:

* * *

II. Policy – Nebraska State Patrol Rules of Conduct

* * *

C. All the ethical standards and rules expressed in the Nebraska State Patrol Code of Ethics, as outlined in 01-03 in the Canons of Police Ethics, and in this policy constitute the standards of conduct by which all officers of the Nebraska State Patrol shall be governed.

* * *

F. Specific Rules of Conduct

1. Conduct unbecoming – Employees shall conduct themselves at all times, both on and off duty, in such a manner as to reflect most favorably on the Nebraska State Patrol. Conduct unbecoming shall include that which brings the State Patrol into disrepute or reflects discredit upon the employee as a member of the State Patrol, or that which impairs the operation or efficiency of the State Patrol or the employee. * * *

* * *

3. Associations – Employees shall avoid regular or continuous associations or dealings with persons or groups or organizations whom they know, or should know, are persons or groups or organizations under criminal investigation or indictment or who have a reputation for present involvement in felonious or criminal behavior, except as necessary to the performance of official duties or where unavoidable because of other personal relationships of the officers.

* * *

SOP52-1 Number 10-01-01 – Notification of Employee:

I. Notification of Accused Employee

Prior to the investigation of any formal Internal Affairs complaint, it shall be necessary to notify the accused employee of the alleged misconduct.

A. Notification of the employee shall be documented on the formal complaint, NSP80I A

B. Notification of an Internal Affairs investigation shall be made by the employee's Commander or designee, but not by the assigned investigator.

C. The employee and the employee's Commander or designee shall sigh [sic] and date the formal complaint, NSP801A.

* * *

SOP52-1 Number 11-01-01 – Waiver of Notification of Employee:

I. Waiver of Notification

In compliance with policy and contract, in instances where serious misconduct is alleged, and notifying the employee could hinder the investigation, a waiver may be sought.

A. A written request to the Office of the Superintendent shall be prepared by the Internal Affairs Commander or the Commander's designee. . . .

B. The request shall contain a summary of the alleged misconduct.

C. The request shall state that the notification of the employee may hinder investigation of the complaint and why.

D. The request may also include waiver of notification of the employee's Commander.

E. The waiver shall either be approved or disapproved by the Superintendent of the Patrol or the Assistant Superintendent in the Superintendent's absence.

* * *

G. Under no circumstances shall an Internal Affairs investigation be started prior to notifying the accused employee without the approval of the Office of the Superintendent.

* * *

SOP52-1 Number 12-01-01 – Investigation of Internal Affairs Complaints:

I. Investigation of Internal Affairs Complaints

The following are guidelines for the investigation of Internal Affairs complaints. * * * . Under no circumstances shall an Internal Affairs investigation be conducted without the authorization of the Internal Affairs Division or the Office of the Superintendent.

A. Complaints alleging serious misconduct and incidents involving accidental or intentional firearms discharges (other than to destroy an animal) or others at the direction of the Superintendent shall be conducted by the Internal Affairs Division.

* * *

C. Complaints alleging less than serious misconduct may be forwarded by Internal Affairs to the accused employee's Commander for investigation.

* * *

SOP52-1 Number 13-01-01 – Extension of Internal Affairs Cases:

I. Extensions of Investigations.

Due to the complexity of some Internal Affairs investigations it may become necessary to request an extension of the investigative and administrative time limits to complete the investigation.

A. Requests for extensions shall be submitted through the Commander of the Internal Affairs Division so as to insure proper tracking of Internal Affairs cases.

B. Requests for extensions shall be prepared on interoffice stationary and addressed to the Office of the Superintendent.

C. Extension requests shall contain the following information:

1. The date the extension id [sic] being requested.
2. The case number. . . .
3. The reason for the extension.
4. The date the original 45 day investigative time limit will end.
5. The number of days that are being requested to extend the time limit.
6. The date that the time limit will be extended.

* * *

SOP 83-1 Criminal Investigations (Administrative Subpoena):

* * *

II. Policy

Administrative Subpoenas are used to gain information held by third party custodians that are holding information needed to further a criminal investigation, in the proper

conformance of our duties, and in the efficient enforcement of state statute. * * *

* * *

VI. ***Relevant Policies:***

01-03 – Code of Ethics:

* * *

Canons of Police Ethics

* * *

Article 6. Private Conduct

The law enforcement officer shall be mindful of their special identification by the public as an upholder of the law. Laxity of conduct or manner in private life, expressing either disrespect for the law or seeking to gain special privilege, cannot but reflect upon the police officer and the police service. The community and the service require that the law enforcement officer lead the life of a decent and honorable person. * * * they will so conduct their private life that the public will regard them as an example of stability, fidelity and morality.

* * *

03-11 – Disciplinary Procedures – May 1, 2001:

I. Purpose

The Nebraska State Patrol must be accountable for the acts of all its employees. Discipline is a method of deterring intentional misconduct. Disciplinary procedures are intended to encourage compliance with

all policies, provide sanctions for misconduct, and protection from false accusation.

II. Policy

All supervisors shall determine if sufficient just cause exists to discipline. Just cause means there is a reason for the action taken and the reason is neither arbitrary nor capricious and is supported by a thorough and accurate investigation of the alleged misconduct. Therefore, discipline must be based on solid, formal, and written foundation.

* * *

03-19 – Complaint Process:

I. Purpose

To provide a formal process in which citizens may communicate complaints and grievances against the State Patrol and/or its employees to the agency, and receive a response to their concerns from the agency.

II. Definitions

A. Complaint: an allegation, made by any person against the State Patrol or its employees.

B. Complaint Control Form NSP801: The form used to insure that a complaint is received, processed, and responded to in an appropriate manner.

* * *

D. Conduct and Procedures Review Meeting: A meeting held upon completion of the Internal Affairs Investigation when the recommendation is that the case is founded. This meeting is to afford the accused an opportunity to present mitigating circumstances or reasons why they should not be disciplined, to their commander or designee, prior to any recommendation of disciplinary action being authored.

E. Founded Complaint: The accused employee committed all or part of the alleged misconduct.

* * *

K. Misconduct: Violation of, or failure to comply with, Federal or State Constitution or statute, an executive order, published rules, regulations, policy or procedures of the employing agency or the State of Nebraska Personnel system.

L. Not Sustained Complaint: Insufficient evidence is available to clearly prove or disprove an allegation of misconduct.

M. Unfounded Complaint: The accused employee did not commit the alleged misconduct, or their actions were justified, legal and proper.

N. Serious Misconduct: Corruption, criminal misconduct, brutality, excessive use of force, use of deadly force (,) breach of civil rights, or:

1. Gross Immorality
2. Misuse of State Property: Units accidents involving misconduct, misuse of credit cards, or conversion.
3. Violation of policy or law regarding evidence.
4. Misfeasance: During an arrest or the execution of any warrant of any type.
5. Nonfeasance: Involving serious misdemeanor, any felony, or during an emergency.

O. Disciplinary Conference: A conference conducted between the employee and the agency director prior to the imposition of any serious disciplinary action. This conference . . . will only occur when the recommended discipline is suspension or more serious.

* * *

V. Investigation of Complaints

A. The Investigator shall conduct a complete, thorough and impartial investigation to determine if the complaint is:

1. Founded
2. Unfounded
3. Not Sustained

* * *

07-32 – In-Car Video Cameras – January 1, 1989:

I. Purpose

This policy will provide guidelines for the operation of mobile audio/visual recording equipment used in State Patrol vehicles. * * *

II. Policy

* * *

C.

1. Audio/visual recording equipment installed in Patrol units shall be utilized to record all stops.

2. Audio/visual recording equipment shall be installed in such a manner as to automatically begin recording when the Patrol unit's emergency lights are activated. * * *

* * *

b. Officers are encouraged to manually operate the audio/video equipment to record driving performance of a motorist, that may provide probable cause for a traffic stop or arrest, (DWI, reckless driving, etc.)

c. Officers shall activate their wireless microphone at all times when the recording equipment is in operation.

* * *

f. Officers shall not cease audio/visual recording until each traffic stop is complete.

* * *

F. Use of Tapes by Supervisors.

1. First-line supervisors and officers utilizing audio/visual recording equipment will select, at random, for review tapes of their subordinate officers to assist them with quality reviews and annual performance evaluations. * * *

* * *

G. Complaints Received.

1. Any time a complaint alleging misconduct is made which involves an officer who is assigned an in car audio/video recording device, the following procedures shall be followed:

* * *

1) The Troop Area or Division Commander or their designee shall review the tape of the contact in question within 48 hours of the receipt of the complaint.

* * *

VII. ***Relevant Statutes*:**

Section 27-510

Rule 510. Identity of informer; rule of privilege; who may claim; exceptions; informer appearing as

a witness; procedure; orders; legality of obtaining evidence.

(1) The government or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

* * *

VIII. *Background*:

Robert E. Henderson ("Henderson," "Grievant") was an eighteen- (18-) year employee of the Nebraska State Patrol ("Management," "Agency," "State Patrol," "Patrol," "NSP"). During the time relevant to the instant dispute, the Grievant was employed as a State Trooper in the Traffic Services Division, and was assigned to Troop A, based out of Fremont, Nebraska. Prior to beginning his employment with the State Patrol, the Grievant served as a military police officer, followed by five- (5-) years' employment as a patrolman with the Fremont, Nebraska, Police Department.

At some point before January of 2003, the Grievant developed marital problems. On January 13, 2003, the Grievant's wife left the Grievant for a Hispanic man; divorce proceedings were filed in June of that year.

At an unspecified time, the Patrol imposed upon the Grievant a Work Improvement Plan, in order to address deficiencies in the Grievant's

performance; the Grievant completed the Work Improvement Plan in April of 2005.

In August of 2005, Sergeant Todd Kinghorn ("Kinghorn") was promoted to Lieutenant and transferred from the sex-offender registry to Internal Affairs. On August 26, 2005, Lt. Kinghorn received a Complaint Control Form ("801 Form," "NSP 801," "801") from Captain Tom Schwarten alleging that the Grievant was abusing his authority and harassing a black man who was employed as a new anchor for a television station in Omaha, Nebraska. The Grievant had pulled-over the news anchor because the news anchor had been residing in Nebraska for more than thirty (30) days and had not yet obtained Nebraska license plates, as required by law. The Grievant issued the news anchor a warning. This same news anchor and the Grievant's fiancée worked for the same television news organization and there appears to have been some friction between the two coworkers. After being stopped by the Grievant, and being warned to obtain Nebraska license plates, the news anchor lodged a complaint against the Grievant. The Agency conducted an investigation into the incident – including a review of the in-car video of the traffic stop that was the genesis of the allegation – and concluded that the Grievant had not engaged in any misconduct.

On October 17, 2005, Captain Lloyd Peters ("Peters") received information from the Kansas Bureau of Investigation ("KBI") that a law enforcement officer in Nebraska may have joined a website affiliated with the Ku Klux Klan ("KKK,"

"Klan"). The information provided by the KBI included mention of an incident that sounded to Management quite similar to the one involving the Grievant and the reporter from Omaha. The Agency prepared a Complaint Control Form ("801 Form," "NSP 801," "801") on October 31, 2005 regarding this incident. In relevant part, the 801 read:

> On October 17, 2005 Captain Peters became aware of information.
>
> "I have been in law enforcement 23 yrs. My fiancée has been working in TV news locally for 8yrs. A recent hired black anchor ie: they need people of color on the news desk, has been trying to get real friendly with her. But she has told him to leave her alone. She even complained to the higher up's. They told her not to cause trouble. So, I contacted him, the black anchor and old [sic] him the same thing. Leave her alone. I was very polite and kind about it. He complained to my Capt, that I was harassing him. I was found not to be thru and investigation done by IA. But I was told not to contact him any more by my Capt. My fiancée went to an atty. That specializes in these matters. She was told the black card wins all the time. So she probably should start looking for another job, or just
> not say anything to anyone at work. It is pretty bad when a person can not even complain about these things and

> they are told to stay away or not say anything. Over my 23 years in my job this sort of thing has been getting worse, not only at work, but also with suspects. Whites are loosing there rights slowly. It's sad. I pray about it. I hope my prayers get answered. White knight in Ne."
>
> Preliminary inquiries designed to eliminate any State Patrol employees as being the author of the posting revealed the event discussed to be consistent with one involving Trooper Robert Henderson.

Internal Affairs received the 801 on November 1, 2005, and then completed an "801A," which signified the initiation of a formal Internal Affairs investigation.

On November 16, 2005, Lt. Todd Kinghorn ("Kinghorn") sent Captain Thomas Schwarten a copy of the complaint and notified him that, "This investigation will be conducted by Internal Affairs Division and should be completed before *December 15, 2005*, to insure compliance with the 45 day investigative time limit." (Emphasis original).

On November 16, 2005, Kinghorn sought a "Waiver of Notification" from Colonel Bryan Tuma ("Tuma," "Superintendent, "Agency Director"), in order to allow Kinghorn to surreptitiously investigate the Grievant's alleged ties to the KKK. Kinghorn's memorandum stated:

> Lieutenant Kinghorn is requesting a Waiver of Notification as outlined in

> SOP 52-1 be granted on this investigation. This case was started on November 1, 2005 after receipt of an internal complaint from Captain L. Peters
>
> The Complaint alleges Trooper Robert E. Henderson may be participating in on-line discussions in a "member's only" website accessed through the website *www.theknightsparty.com*. This website is known to be affiliated with the Klu (sic) Klux Klan.
>
> Lt. Kinghorn is seeking the approval to work undercover in attempts to access the "members only" website to see if the alleged misconduct is taking place by Trooper Henderson. Notification of this investigation to Trooper Henderson my [sic] hinder undercover operations should Trooper Henderson be notified of this internal investigation at this time.

Tuma approved Kinghorn's request on November 18, 2005.

Kinghorn began his investigating of the *www.theknightsparty.com* web site ("Web Site") on November 22 by typing a Web address given to him by Peters. That address led to a member's-only section of the site, which was only accessible to registered, fee-paying members. Unable to proceed further, Peters advised Kinghorn to investigate two additional web sites: *www.kkk.bz* and *www.kkk.com*. This led Kinghorn to the public portion of the Web Site, run by the Knights

Party, of Harrison, Arkansas. In the public portion of the web site, Kinghorn found references to:

- Christianity
- "The truth about Martin Luther King:
- The "Knight's Ten Commandments"
- Illegal immigration
- Media policies
- A free booklet for law enforcement
- "The truth about Kwanza"
- Gun control
- Information on the federal Government
- Homosexuality
- Hate crime legislation
- The history of the Ku Klux Klan
- How to become a "Klansman or Klanswoman"

Kinghorn used the "Join Now" link on his computer to begin the process of becoming a member of the web site, for the purpose of conducting his undercover investigation, The web site required users to pay a yearly fee of $35, for which users obtained a user name, password, and membership in the Knight's Party. The Knight's Party website is run by a "Klanswoman" by the name of Rachel Pendergraft ("Pendergraft"), who is the daughter of Thomas Robb ("Robb"). The Knight's Party also operates under the name Christian Concepts. Robb is a Baptist Minister,

who is also considered by some to be one of the foremost leaders of the KKK. These interlocking associations/corporate pseudonyms appear to be an attempt to cloak the "friendlier face" of the Knight's Party, from its ultimate corporate parent, Robb's faction of the KKK.

Kinghorn printed an application form from the Web Site, and, on December 5, 2005, obtained a post office box where he could obtain correspondence from Christian Concepts. The Application form included the following statements:

> The Knights Party is always looking for good men and women to associate with and work toward White Christian Revival. Those who become Klansmen and Klanswomen will receive The Crusader, issues of Robb's Victory Report, special mailings and announcements, a beautiful certificate and a passport (i.d. card) The Knights' Party is not a secret society but rather a political movement, an alternative from the November Criminals of the Republican Party and Democrat Party.
>
> * * *
>
> Klansmen and Klanswomen can resign at anytime
>
> * * *
>
> White people of all economic backgrounds are invited to work together to promote the return of Christian principles to government. Whether they be a doctor, a housewife, a factory worker, * * * , etc. all White Christians should work together based on their support

of the Knights' Party our dream of White Christian Revival so that each can fulfill their dream and provide that opportunity to their children.

We are a political party building a strong foundation nation wide. We do not run candidates at this time so that all financial resources can be invested into the grass roots level – therefore we do not fall under the federal political party guidelines. Unlike the other political parties where they have to make public the names of contributors and associates. We do not. Your Klan association is kept strictly confidential.

We are a Christian organization and in spite of what enemies of the Klan say or in spite of those who appear on talk shows and claim they are Klansmen and Klanswomen, we are nonviolent and won't allow such behavior. We are not opposed, however to self-defense only aggressive behavior.

The application fee is $35 and is renewable each year.

* * *

I am white and not of racially mixed descent. I am not married to a nonwhite. I do not date nonwhites nor do I have nonwhite dependents. I believe in the ideals of Western Christian civilization and profess my belief in Jesus Christ as the Son of God.

I understand that The Knight's Party is legal and law abiding and that I will never be asked to commit an unlawful act.

I understand that (The Knights) and (The Knights Party) are one and the same and can be used interchangeably just as GOP and Republican Party or The Grand Old Party and that these titles are the legal trademarks of The Knights Party, inc. and its national director Pastor Thomas Robb

I understand that I am not a representative of The Knights' Party I agree to follow the guidelines as set by headquarters to the best of my ability and to do what I am able to promote the interests of The Knights Party and its ultimate goal of political power and White Christian Revival.

I understand that The Knights Party and its national director Pastor Thomas Robb has a trained staff at its national headquarters in Harrison, AR which can help me find my potential as a Klansman or Klanswoman. They can answer my questions, help me and give me suggestions as I move up in rank. If I am interested in becoming a recruiter they will be there to assist me and instruct me in organizing my area.

I understand I will be expected to be honest, ethical, sacrificing, dedicated, disciplined, and loyal.

Kinghorn received his user name and password to the Web Site on December 22. The following day, Kinghorn began his investigation of the member's-only portion of the Web Site.

Kinghorn discovered that a user calling himself "White Knight in Ne" ("White Knight") had joined the Web Site on September 20, 2005 and had made a total of four (4) posts on the site. These posts were as follows[2]:

- (September 20, 2005, New Guy) I am the new guy from Nebraska. Just want to say hi. Hope everyone is doing good. Give me hints on how this works. THANKS!!!!

- September 20, 2005, Needing people of color) I have been in law enforcement 23 yrs. My fiancée has been working in TV news locally for 8 yrs. A recent hired black anchor ie: they need people of color on the news desk, has been trying to get real friendly with her. But she has told him to leave her alone. She even complained to the higher up's. They told her not to cause trouble. So, I contacted him, the black anchor and told him the same thing. Leave her alone. I was very polite and kind about it. He complained to my Capt, that I was harassing him. I was found not to be thru and investigation

[2] The date of the post and the message title are included within parentheses.

done by IA. But I was told not to contact him any more by my Capt. My fiancée went to an atty. That specializes in these matters. She was told the black card wins all the time. So she probably should start looking for another job, or just not say anything to anyone at work.

It is pretty bad when a person can not even complain about these things and they are told to stay away or not say anything. Over my 23 years in my job this sort of thing has been getting worse, not only at work, but also with suspects. Whites are loosing there rights slowly. It's sad. I pray about it. I hope my prayers get answered. White knight in Ne.

- (September 21, 2005, Need other klansmen and klanswomen in my area) Can someone put me in touch with others in the omaha, ne area that have the same beliefs that I do. God Country and Race. Your White Knight in Ne.

- (September 25, 2005, Need other klansmen and klanswomen in my area) I guess I was stupid when I asked to be put in touch with other members in Nebraska. I know everyone must be discreet. I especially need to be discreet because of my job ie: law enforcement. But if anyone wants to contact me, being discreet. You can contact me by e-mail rhender@cox.net or phone 402-618-0697. I'm in Omaha. If no one contacts me be-

> cause or privacy I fully understand. Your White Knight in Ne. P.S. I especially would like to know other law enforcement people. As we would have a lot in common.

Kinghorn compared the personal information in White Knight's Web Site postings to the information the Agency had in its files and determined that the White Knight was very likely the Grievant, although the telephone number and e-mail address White Knight posted online did not correspond to information in the Agency's files. Kinghorn's investigation also determined that, although White Knight might be the Grievant, no State computer was used to access the Web Site, and none of the posts were made during a time that the Grievant was on duty.

On December 30, 2005, Kinghorn sent two administrative subpoenas[3] in support of his investigation. One subpoena was sent to Alltel Communications, in order to obtain subscriber information for the telephone number White Knight had posted on the Web Site. That subpoena read, in relevant part:

> The records and testimony, which are the subject of this subpoena, are material and relevant to an ongoing criminal investigation.

---

[3] The Subpoenas were sent over the name of Lt. Colonel Darrell Fisher, on behalf of the Superintendent, but were prepared by Kinghorn.

> Please do not release, as such disclosure could impede the ongoing investigation.

The other subpoena was sent to Cox Communications, in order to obtain subscriber information for the e-mail address White Knight had posted on the Web Site. That subpoena read, in relevant part:

> The records and testimony, which are the subject of this subpoena, are material and relevant to an ongoing investigation. Do not release, as such disclosure could impede the ongoing investigation.

Alltel responded via facsimile on January 3, and identified the subscriber as the Grievant. Cox Communications responded by facsimile two days later, and also identified the subscriber as the Grievant.

On January 6, 2006, Kinghorn, using a *nom de plume*, responded to the Grievant's post seeking to make contact "with other klansmen or klanswomen in my area." White Knight never responded to Kinghorn's overture.

On January 15, 2006, the investigatory due date expired. Three days later, Kinghorn requested an extension of the due date until February 15, 2006. On January 19, 2006, the Superintendent approved this extension.

On January 30, 2006, the Grievant was given notice of the investigation, through an "Attachment to Complaint Control Form," which he signed. On February 1, 2006, Kinghorn conducted an investigatory interview with the Grie-

vant for the purpose of determining whether the Grievant was guilty of the following offenses: "Application of Code and Canons, Private Conduct, Specific rules of conduct, and association with known criminals and felons."

On February 1, 2006, Kinghorn conducted an approximately hour-long interview with the Grievant. This interview was audio taped.

On February 2, Kinghorn prepared a synopsis of his interview with the Grievant and recommended "all of the allegations against [the Grievant] be FOUNDED." (Emphasis original). Specifically, Kinghorn wrote:

> * * * [A]n employee of the Agency [has] been participating in on-line discussions in a Members Only website accessed through the website www.theknightsparty.com. The website is affiliated with the Ku Klux Klan.
>
> As a result of the Internal Affairs Investigation, the suspected employee who used the name "White knight in NE" was identified as being [the Grievant]. This information was confirmed during the interview of [the Grievant] when he admitted to being the individual who posted information on the above mentioned website under the name of "White knight in NE."
>
> Based on the research conducted by Lt. Kinghorn and the interview of [the Grievant], Lt. Kinghorn uncovered the following information"

- [The Grievant] indicated in one of the discussion threads that he has been a member of law enforcement profession for 23 years. Lt. Kinghorn confirmed this by reviewing [the Grievant's] personnel file, which indicated [the Grievant] has been employed with the State Patrol for approximately 18 years. * * * he was previously employed as a law enforcement officer with the Fremont Police Department for approximately 5 years, [The Grievant's] combined years of service in law enforcement 23 years. [The Grievant] confirmed his years of service in the law enforcement profession during his interview to Lt. Kinghorn.

- During [the Grievant's] statement, he admitted he has been a member of the Knights Party since June of 2004. [The Grievant] also admitted to authoring the five discussion threads. [The Grievant said] he did not author any other postings . . . [Kinghorn confirmed this] by gaining access to the members' only website. Lt. Kinghorn did not discover any additional postings as it related to the "White knight in NE."

- The website www.theknightsparty.com is associated to Christian Concepts which is another name associated with the Ku Klux Klan. That

association was evident by Lt. Kinghorn gaining access to "theknightsparty.com" website and observing photographs on the website identifying the Ku Klux Klan. One photograph listed the address of the Ku Klux Klan as the same address listed for Christian Concepts. Although [the Grievant] may not have known the individuals replying to his postings on the website, the fact that [the Grievant] obtained a membership in order to gain access (to) the website, completed a registration form, [paid] a membership in order (to be) granted access indicates [the Grievant] had an association with persons/organization (Ku Klux Klan) who are known to have a reputation for past involvement in felonious and criminal behavior. [The Grievant] also admitted during his interview that his association with this group was not in the performance of his official duties as Nebraska State Trooper.

- Regarding to Policy 03-08 II.F.1. Specific Rules of Conduct – Conduct Unbecoming. [The Grievant] acknowledged his dealings with The Knights' occurred while in an off duty capacity. [the Grievant's] membership reflects negatively on the Nebraska State Patrol and it could

impair the operation or efficiency of the agency.

- Regarding to Policy 03-08 II.C. Application of the Code and Canons – Private Conduct. [The Grievant] demonstrated his laxity of conduct by becoming a member of the Ku Klux Klan. [The Grievant] indicated he had become a member of the Ku Klux Klan because his spouse divorced him for a minority. [The Grievant] claimed the Ku Klux Klan afforded him the avenue to vent his frustration in such a manner that he was unable to do so with his coworkers. [The Grievant] was unable to provide any legitimate justification for joining the Ku Klux Klan. Lt. Kinghorn was unable to find any legitimate justification for [The Grievant] joining and posting information to the Knights' Party website. * * * this type of conduct could bring the agency into disrepute by having a law enforcement officer having an active membership in such an organization. Lt. Kinghorn recommends all the allegations against [The Grievant] be FOUNDED. (Emphasis original).

On February 8, 2006, Captain Schwarten sent a memorandum to the Grievant to "attend a conduct a Conduct and Procedures Review Meeting on February 21, 2006." The memorandum

accused the Grievant of "violating the following policies:"

03-08, II., F., 1 – Specific Rules of Conduct

03-08, II., C – Application of Code, Cannons – Private Conduct

03-08, II., F., 3 – Association with Known Felons/Criminal Behavior

Schwarten's memorandum also stated, "Lieutenant Kinghorn has ruled these allegations as FOUNDED based upon his investigation." (Emphasis original).

The day before his Conduct and Procedures Review Meeting, the Grievant e-mailed his resignation from Christian Concepts to Thomas Robb.

At 1:00 p.m., on the afternoon of Feb 21, 2006, Captain Schwarten, one Lieutenant Bridges ("Bridges"), and Sergeant Kevin Kavan ("Kavan") met to determine the level of discipline to recommend the Agency impose upon the Grievant. After meeting for approximately 3½ hours, the three decided to "part and think about it overnight."

The following morning, the three officials again met and rapidly concluded that termination was the appropriate discipline. They communicated this recommendation to the Superintendent. At about 3:00 p.m. that same day, a lawyer for the Knight's Party faxed to the NSP a document that provided an overview of the Knight's Party Corporation. This document included the

following description of the organizations principle activity:

> publishes newsletter, publicizes opinions to public based on Christian principles, holds meetings, educates individuals who wish to promote aforementioned activity – by use of books, Cd's DVD's written reports. Works to educate general public about the benefits of Biblical solutions to family, community, and national problems. Association status open to white Christian men and women. Supporter status open to Christian men and women regardless of racial background.

On March 3, 2006, the Superintendent concurred with Schwarten, Bridges, and Kavan's recommendation to terminate the Grievant's employment with the Agency.

That same day, Kinghorn wrote to Schwarten, informing him that the Superintendent was considering imposing discipline of "suspension or greater" upon the Grievant. Kinghorn requested that Schwarten inform the Grievant in writing about the Superintendent's decision and to offer the Grievant an opportunity to meet with the Superintendent "to present mitigating evidence or present reasons why disciplinary action should not be taken."

Schwarten sent the notice to the Grievant on March 3, 2006. That same day, the Superintendent placed the Grievant on "paid investigatory suspension . . . pending the completion of administrative proceeding" into his involvement with the KKK.

On March 15, 2006, the Superintendent terminated the Grievant, "effective the close of business" that day. The Superintendent explained:

> I feel that disciplinary action should be taken as a result of your actions. It is my opinion that you violated the following:

Nebraska State Patrol Policies and Procedures:

> 03-08 II.F.1 (Specific Rules of Conduct)
>
> 03-08 II. C. (Application of Code of Ethics, Cannons-Private Conduct)
>
> 03-18 II. F. 3. (Association with Known Felons)

Prior to terminating the Grievant, the Superintendent notified the Governor's chief of staff about the Grievant's actions and the Superintendent's decision to terminate the Grievant's employment.

The Union grieved the Grievant's dismissal on March 20, 2006. The State Patrol rejected this appeal. When the parties were unable to resolve the dispute, this Hearing ensued.

On or about May 17, 2006, while preparing for the Hearing, Management conducted research into the nature of the KKK. Some of this material was offered as evidence by Management, and admitted by the Arbitrator – over the objection of the Union. One of these documents, from the Anti-Defamation League's Law Enforcement Agency

Resource Network includes the following observations about the KKK:

* * *

> Once America's preeminent terrorist organization, the Ku Klux Klan today is an amorphous collection of independent groups and individuals, constantly squabbling over diminishing memberships and limited resources. Passed over by most young white supremacists, who consider Klansmen to be ineffectual and faintly ridiculous old-timers, the group presents far less of a threat to public order than at any time in the past century. * * *
>
> * * *
>
> Today there is no such thing as the Ku Klux Klan. Fragmentation, decentralization and decline have continued unabated. Many of the estimated 110 Klaverns [local units] remain at least nominally independent.

Also on May 17, 2006, a State Patrol employee, Sheri King, sent an e-mail to Kinghorn, in which she responded to his request for information on the KKK and Thomas Robb, the leader of the Knights of the Ku Klux Klan:

> Thom Robb is the current leader of the Knights of the Ku Klux Klan. Robb is an ordained Baptist Minister. Born in Detroit, Michigan and later moving to Tucson, Arizona with his family when he was a young man, Thomas Robb became active politically when he was 17 years old speaking out

> against all forms of socialism. This was a guy who was trying to create a "kindler, gentler" Klan. * * * Robb joined the KKK in 1979 and emerged as head of the Knights in 1989, after David Duke left to form the National Association for the Advancement of White People (NAAWP). He has honed Duke's strategy of divorcing the KKK from its violent past by stating that the KKK is a "white civil-rights organization" and also that the Klan does not teach hatred of Blacks and Jews, but rather "love of the white race," Like Duke, Robb has attempted to enter mainstream politics by running for the Arkansas State legislature as a Republican. However, the state party would not put Robb on the ticket. Also like Duke, Robb has even gone so far as to eschew the traditional Klan head titles of Grand Dragon or Imperial Wizard, and he has instead chosen to be called the National Director of the Knights
>
> * * *
>
> While both sources from within and outside the Knights claim it is the largest Klan faction . . . Robb's ostensible moderation in comparison to former Klan heads has led to major splintering of the Knights. * * *

On May 26, 2006, the State Patrol requested that the FBI provide an agent who is an expert in the KKK, and who has participated in investigating some of the most well known and notorious acts of violence conducted by the KKK, to testify at the Hearing. The United States Justice Department granted this request on May 31, 2006.

IX. ***Position of the State Patrol:***

The State Patrol argues fifteen (15) main points:

1) The Ku Klux Klan "is, as a matter of fact and law a racist organization and since 9-11 "seven Klan members have been convicted of crimes of violence";

2) The KKK "and the Nazis are unique among American institutions in that the mere mention of their names and symbols provoke the long term memory of the minority communities invoking fear, anger and distrust;

3) The public does not make distinctions between KKK factions like the Knight's Party, which publicly eschews violence and "the illegality and violence to other branches of the Klan";

4) When law enforcement officer have been involved with the KKK, it has had "obstructive consequences" for solving crimes involving domestic terrorism and "simply being a Klansman brings discredit to the officer and brings the agency into disrepute";

5) The Grievant does not deny being a member of the KKK;

6) This membership "seriously compromised" the Grievant's ability to uphold the "public trust," which is a "recurring theme" of the Code of Ethics;

7) The Grievant's involvement with the KKK posed an "existential violation rather than a behavior or performance issue. As long as he is employed, the agency will always have a Klansman or a former Klansman with all that entails in terms of trust of the community and allied law enforcement agencies";

8) By joining the KKK, the Grievant engaged in "conduct unbecoming," and "reflects discredit upon" the Grievant;

9) With respect to the Grievant having "dealings with persons or groups or organizations whom they know, or should know, are persons or groups or organizations under criminal investigation or indictment or who have a reputation for present involvement in felonious or criminal behavior," the Patrol asserts, "It is axiomatic that the Klan has a reputation for involvement in criminal behavior";

10) The administrative subpoena's were issued properly;

11) The State Patrol properly disciplined the Grievant and, "The employer was, at the very least, in substantial compliance with every pertinent provision of contract, policy and SOP and Grievant was afforded every constitutional protection to which he was entitled";

12) The State Patrol "acted out of concern for its ability to function in a safe, orderly and efficient manner, with the full trust and confidence of all of its own members, members of the public and those of allied law enforcement agencies" and it conducted "a very deliberate, thorough and fair investigation in which every step and consideration was documented";

13) Lesser levels of disciplined were considered and ultimately rejected because of "the existential nature of the offense and the enormity of the wrong, of the harm to the agency's ability to operate with trust and effectiveness";

14) Although the Grievant may be capable of performing the job from which he was discharged, because of his association with the KKK, "the ability of the agency to function fully and effectively could be seriously disrupted and compromised upon the inevitable public disclosure of his membership";

15) Faced with a "defiant and unrepentant" Grievant, the State Patrol had no option but to terminate the Grievant's employment.

X. ***Position of the Union:***

Union argues eleven (11) main points:

1) The Department had the burden of proof in and in Nebraska there is no

presumption that a State agency's decision to discipline an employee is correct;

2) The Contract mandates that "disciplinary actions shall be based on good faith for just cause" and that discipline "is to be conducted in accordance with due process" and that "employee's rights and privacy will be protected" during the course of an investigation's of employees;

3) The Grievant is being disciplined for legal private conduct, in violation of his right to "free speech and freedom of association under the First Amendment to the United States Constitution";

4) The Grievant's "thought processes, private conduct, and political or religious beliefs or contacts cannot be controlled by [the State Patrol] so long as he does not, by his own public actions, present himself as a Klan representative, recruiter, or spokesman";

5) In a case involving New York Police Department (Locurto v. Giuliani, 369 F.Supp. 368 (S.D.N.Y. 2003)), where the city of New York terminated several white police officers and firefighters who rode upon a parade float titled "Black to the Future,' dressed in blackface, and "engaged in offensive, vulgar behaviors and stereotypes," the Court concluded that the fired-employees' First

Amendment rights outweighed New York City's "governmental interest" in avoiding "potential disruptiveness" with the public that could arise as a result of the employees' participation in the parade;

6) the Agency failed to show "just cause" to discipline the Grievant and violated his Constitutional free-speech rights;

7) The State Patrol violated its own SOP when it used an administrative subpoena to investigate the Grievant as "The Agency SOPs *only authorize* the issuance of an administrative subpoena *for a criminal investigation.*" (Emphasis original).

8) When the State Patrol "implemented its own 'waiver of notification' procedure" it violated Articles 29.3.1, 29.7.3, and 29.9.7";

9) The State Patrol allowed its "45 day limitation pass on January 15, 2006, failed to notify the Grievant of any extension granted on January 19, 2006, to enable him to complain, and then belatedly, after the time ran out, arbitrarily and illegally extended the investigatory time period. . . .";

10) The Grievant did nothing to violate his oath of office and "simply exercised his constitutional right to freedom of speech and association" and what disturbed

the Agency was the "Grievant's perceived 'thinking' or 'thought processing";

11) The Grievant should be reinstated and "restored to the status quo prior to his March 3, 2006 suspension. . . ."

XI. Discussion:

When Trooper Robert Henderson chose to join the KinghtsParty.com website in June of 2004, he set forth a series of events that will likely have repercussions for the Nebraska State Patrol and his own life and career for many years to come. The Arbitrator questions whether the Grievant will ever fully repair his reputation within the State Patrol. The disgust that the Nebraska State Patrol command staff has expressed regarding the Grievant's decision to align himself with the Ku Klux Klan, through his KnightsParty.com membership, is shared by the Arbitrator. The Arbitrator cannot begin to fathom the level of, distrust, fear, or apprehension that citizens who are members of groups traditionally victimized by various factions of the KKK would feel when pulled over for a traffic stop (or otherwise detained) by a member of a police agency that is known to have employed, or to employ a member (or former member) of the KKK. That said, and personal revulsion aside, the Arbitrator has been persuaded that the Nebraska State Patrol violated the Collective Bargaining Agreement when it discharged the Grievant because of his association with the Knights Party web site, Christian Concepts, and the Ku Klux Klan.

The Arbitrator was not asked to determine whether the Grievant is a good man, nor was he asked to determine whether the Grievant has either love or hatred in his heart. The Arbitrator was engaged in order to answer two narrow questions:

- Did the Nebraska State Patrol violate the CBA or its own standard operating procedures or policies when it disciplined the Grievant, Robert Henderson, on March 15, 2006?
- If so, what shall be the remedy?

It is also important to note that, as a matter involving discipline, the State Patrol bore the burden of proving, by a preponderance of the evidence, that its decision to discharge the Grievant was justified under the CBA. Given the Record before him, the Arbitrator find's that the State Patrol did not meet this burden.

In most cases, when assessing whether one party or another violated the terms of a collective bargaining agreement an arbitrator need not – and in fact should not – look beyond the four corners of the parties' agreement. Of course, there are times when it is necessary for an arbitrator to consider the relationship between a contract and other documents such as a policy manual, employee handbook, or other set of rules. In the instant dispute, the CBA references the United States Constitution, Nebraska state statutes, and Departmental policies. Consequently, given the specific nature of the instant dispute, it is both necessary and proper for the Arbitrator to look to

these other documents, which the parties themselves have brought into the Contract.

Because the State Patrol is a public employer, the U.S. Constitution applies to it (through the 14th amendment) in ways inapplicable to a private employer. As such, any provision of the CBA or Departmental policy that conflicts with the terms of the Constitution would have to yield to the Constitution. In the extreme case, for example, a Contractual provision that provided for indentured servitude, would be clearly unconstitutional and, therefore, unenforceable. As such, the Arbitrator will first address the Constitutional issues raised by the instant dispute. The Arbitrator will then turn attention to whether the Department's termination of the Grievant violated either the CBA or any Departmental Policies or SOPs.

The Contractual standard for discipline – which the parties themselves adopted – is "just cause." For employees, getting an employer to agree to subject disciplinary decisions to the just cause standard is one of the most important protections that they can achieve. An employer that agrees to include a just cause provision in its agreement with a union gives up considerable power and discretion in the area of employee discipline; just cause provisions provide employees with significant protection from arbitrary, capricious, inconsistent, and ill-conceived discipline.

As important as just cause is, there is no single definition (widespread reference to the "seven tests" notwithstanding) of what constitutes just

cause to discipline. However, over many years, arbitrators have come to recognize a common set of issues that should be considered when attempting to ascertain whether an employer had just cause to impose discipline upon an employee. Before an arbitrator will find that an employer had just cause to discipline an employee he or she will need to feel confident that: the employee has been treated in a fundamentally fair way; that the employee is not being disciplined for violations of unknown rules; that the employee is not being singled out for punishment that is disproportionate to his or her offense or disproportionate to the level of discipline applied under similar circumstances to other employees with similar seniority, performance, and disciplinary histories, and; that the employer has gathered, through a fair investigation, sufficient credible evidence that the accused employee did in fact commit the offense for which they are being disciplined.

Employers, whose contracts include just cause provisions, have agreed that their employees are entitled to certain procedural safeguards, regardless of their "guilt." Employers who have agreed to these safeguards can expect to have arbitrators overturn even "guilty" employees' discipline if they violate the principles of just cause. Rather than being a matter of form-over-substance, it is a matter of contractually-agreed-upon due process.

After considering the Record before him, the Arbitrator has been persuaded that the State Patrol violated the Constitution, the Contract, and

its own policies and procedures when it discharged the Grievant.

The Grievant was not fired because of his actions on the job; the antagonism the Grievant seems to feel towards non-white racial groups has never reared its ugly head on the job. The Department's traffic-stop data clearly shows that the Grievant has made stops in a race-neutral manner. The Grievant has befriended black members of the Patrol, one of whom was, as of the date of the Hearing, planning on being a participant in the Grievant's wedding. The Grievant has not been the subject of any founded complaint made by a minority citizen, and in over eighteen (18) years with the State Patrol only one such complaint was ever filed against him – which was determined to be unfounded. That one complaint was filed by the black television news anchor who had, in fact, been in violation of the law when the Grievant pulled him over. Even so, the Grievant did not issue a summons at that time, and instead issued the news anchor a warning.

The Department was not able to point to a single instance on the job – or for that matter at any time, including his off-duty hours – where the Grievant's actions exhibited any hatred, anger, disgust, or discrimination towards any minority group. The one exception to this would be the lack of good will the Grievant felt towards the Hispanic man for whom the Grievant's wife left him; but there is nothing in the record to persuade the Arbitrator that the Grievant had

spoken out or taken any ill-actions against any member of the broader Hispanic community.

In short, the Department discharged the Grievant because of his beliefs and because he sought out others who shared his beliefs. The Arbitrator has been persuaded that this motivation for terminating the Grievant violated the Grievant's First Amendment Rights. There are a multitude of U.S. Supreme Court decisions in which the Court has found that public employees are entitled to broad protection of their political beliefs and their right to associate with those who share those beliefs, and to also express their political beliefs. An analysis of the Court's decisions in this area could fill a large law review volume, and the Arbitrator will not attempt a full analysis within this Award. Nevertheless, several notable cases stand out and deserve mention.

In re. Mills v. Alabama, 384 U.S. 214, (1966) the Court held:

> Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes. 384 U.S. 214, 219.

The parties are quite familiar with the Supreme Court's 1967 decision of Garrity v. New

Jersey, 385 U.S. 493. Although that decision usually affects the parties in a different context, the Court's holding that "policemen, like teachers and lawyers, are not relegated to a watered-down version of constitutional rights" is applicable to the instant matter. 385 U.S. 493, 500.

Shortly after issuing its *Garrity* ruling, the Supreme Court wrestled with the free speech rights of public employees in re. Pickering v. Board of Education, 391 U.S. 563 (1968). *Pickering* established a balancing test for assessing whether public employees may be disciplined for exercising free-speech rights:

> " . . . the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of the speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U.S. 563, 568.

The Supreme Court has also clearly stated that public employees retain rights of association regardless of whether those associations make a public employer uncomfortable or angry. In re. Elrod v. Burns, 427 U.S. 347 (1976), the Court held:

> "political belief and association constitute the core of those activities protected by the First

> Amendment." * * * "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. And, though freedom of belief is central, "[t]he First Amendment protects political association as well as political expression." Buckley v. Valeo, supra, at 15. "There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments. NAACP v. Button, 371 U.S. 415, 430 ; Bates v. Little Rock, 361 U.S. 516, 522-523; NAACP v. Alabama, 357 U.S. 449, 460-461. The right to associate with the political party of one's choice is an integral part of this basic constitutional freedom." Kusper v. Pontikes, 414 U.S. 51, 56-57 (1973)." 427 U.S. 347, 356-57.

In 1977, the Court held in re. Abood v. Detroit Board of Education, 431 U.S. 209, "Besides voting in accordance with his convictions, every public employee is largely free to express his views, in public or private, orally or in writing. . . . public employees are free to participate in the full range of political activities open to other citizens." 431 U.S. 209, 230. The Court in *Abood* also stated, "Our decisions establish with unmistakable clarity that the freedom of an individual to associate for the purpose of advancing beliefs and ideas is protected by the First and Fourteenth Amendments. E. g., Elrod v. Burns,

427 U.S. 347, 355-357 (plurality opinion); Cousins v. Wigoda, 419 U.S. 477, 487; Kusper v. Pontikes. 414 U.S. 51, 56-57; NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460-461." And that, "Equally clear is the proposition that a government may not require an individual to relinquish rights guaranteed him by the First Amendment as a condition of public employment. E. g., Elrod v. Burns, supra, at 357-360, and cases cited; Perry v. Sindermann, 408 U.S. 593." 431 U.S. 209, 233.

When reviewing the materials from the Knights Party website and the written materials sent through the mail by the Knights Party/ Christian Concepts, the Arbitrator observes that the group was keenly focused on fundraising. Although the purpose of the fundraising appeals was geared towards achieving goals that many citizens would find objectionable. In *Abood*, the Court emphatically recognized the importance – for people who hold common interests or philosophies – to be able to pool resources for achieving political gains:

> One of the principles underlying the Court's decision in Buckley v. Valeo, 424 U.S. 1, was that contributing to an organization for the purpose of spreading a political message is protected by the First Amendment. Because "[m]aking a contribution . . . enables like-minded persons to pool their resources in furtherance of common political goals," id., at 22, the Court reasoned that limitations

> upon the freedom to contribute "implicate fundamental First Amendment interests," id., at 23.
>
> * * * For at the heart of the First Amendment is the notion that an individual should be free to believe as he will, and that in a free society one's beliefs should be shaped by his mind and his conscience rather than coerced by the State. See Elrod v. Burns, supra, at 356-357; Stanley v. Georgia, 394 U.S. 557, 565; Cantwell v. Connecticut, 310 U.S. 296, 303-304. And the freedom of belief is no incidental or secondary aspect of the First Amendment's protections. . . . 431 U.S. 209 at 234 (Footnotes omitted).

The Court again addressed the *Pickering* balancing test in 1983, in re. Connick v. Myers, 461 U.S. 138:

> For at least 15 years, it has been settled that a State cannot condition public employment on a basis that infringes the employee's constitutionally protected interest in freedom of expression. Keyishian v. Board of Regents, 385 U.S. 589, 605-606 (1967); Pickering v. Board of Education, 391 U.S. 563 (1968); Perry v. Sindermann, 408 U.S. 593, 597 (1972); Branti v. Finkel, 445 U.S. 507, 515-516 (1980). Our task, as we defined it in Pickering, is to seek "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public

services it performs through its employees." 391 U.S., at 568. 461 U.S. 138 at 142.

* * *

For most of this century, the unchallenged dogma was that a public employee had no right to object to conditions placed upon the terms of employment – including those which restricted the exercise of constitutional rights. The classic formulation of this position was that of Justice Holmes, who, when sitting on the Supreme Judicial Court of Massachusetts, observed: "[A policeman] may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). For many years, Holmes' epigram expressed this Court's law. Adler v. Board of Education, 342 U.S. 485 (1952); Garner v. Los Angeles Bd. of Public Works, 341 U.S. 716 (1951); Public Workers v. Mitchell, 330 U.S. 75 (1947); United States v. Wurzbach, 280 U.S. 396 (1930); Ex parte Curtis, 106 U.S. 371 (1882).

The Court cast new light on the matter in a series of cases arising from the widespread efforts in the 1950's and early 1960's to require public employees, particularly teachers, to swear oaths of loyalty to the State and reveal the groups with which they associated. In Wiemann v. Updegraff, 344 U.S. 183 (1952), the Court held that a State could not require its employees to establish their loyalty by extracting an oath denying past

affiliation with Communists. In Cafeteria Workers v. McElroy, 367 U.S. 886 (1961), the Court recognized that the government could not deny employment because of previous membership in a particular party. See also Shelton v. Tucker, 364 U.S. 479, 490 (1960); Torcaso v. Watkins, 367 U.S. 488 (1961); Cramp v. Board of Public Instruction, 368 U.S. 278 (1961). By the time Sherbert v. Verner, 374 U.S. 398 (1963), was decided, it was already "too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege." Id., at 404. It was therefore no surprise when in Keyishian v. Board of Regents, supra, the Court invalidated New York statutes barring employment on the basis of membership in "subversive" organizations, observing that the theory that public employment which may be denied altogether may be subjected to any conditions, regardless of how unreasonable, had been uniformly rejected. . . .

In all of these cases, the precedents in which Pickering is rooted, the invalidated statutes and actions sought to suppress the rights of public employees to participate in public affairs. The issue was whether government employees could be prevented or "chilled" by the fear of discharge from joining political parties and other associations that certain public officials might find "subversive." The explanation for the Constitution's special concern with threats to the right of citizens to participate in political affairs is no mystery.

The First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Roth v. United States, 354 U.S. 476, 484 (1957); New York Times Co. v. Sullivan, 376 U.S. 254, 269 (1964). "[S]peech concerning public affairs is more than self-expression; it is the essence of self-government" Garrison v. Louisiana, 379 U.S. 64, 74-75 (1964). Accordingly, the Court has frequently reaffirmed that speech on public issues occupies the "'highest rung of the hierarchy of First Amendment values,'" and is entitled to special protection. NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982); Carey v. Brown, 447 U.S. 455, 467 (1980).

Pickering v. Board of Education, supra, followed from this understanding of the First Amendment. In Pickering, the Court held impermissible under the First Amendment the dismissal of a high school teacher for openly criticizing the Board of Education on its allocation of school funds between athletics and education and its methods of informing taxpayers about the need for additional revenue. Pickering's subject was "a matter of legitimate public concern" upon which "free and open debate is vital to informed decision-making by the electorate." 391 U.S. at 571-572.

Our cases following Pickering also involved safeguarding speech on matters of public concern. * * * 461 U.S. 138, 143-144.

* * *

Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record. 461 U.S., 147-148.

* * *

The Pickering balance requires full consideration of the government's interest in the effective and efficient fulfillment of its responsibilities to the public. One hundred years ago, the Court noted the government's legitimate purpose in "promot[ing] [461 U.S. 138, 151] efficiency and integrity in the discharge of official duties, and [in] maintain[ing] proper discipline in the public service." Ex parte Curtis, 106 U.S., at 373. As JUSTICE POWELL explained in his separate opinion in Arnett v. Kennedy, 416 U.S. 134, 168 (1974):

"To this end, the Government, as an employer, must have wide discretion and control over the management of its personnel and internal affairs. This includes the prerogative to remove employees whose conduct hinders efficient operation and to do so with dispatch. Prolonged retention of a disruptive or otherwise unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency." 461 U.S. 138, 150-51.

In the knightsparty.com website posting that initially caught the attention of the KBI, and which caused the Nebraska State Patrol to begin the Internal Affairs investigation into the Grievant's off-duty conduct, the Grievant focused his ire on, what he perceived, as the differential application of the law based on race. Given his role as a member of law enforcement, the Grievant was in a position to know if and when the laws, especially traffic laws, of the State of Nebraska were being selectively enforced in a way that most ordinary citizens would not know. Whether the laws of a state are being enforced differently based on a citizen's race or perceived power is clearly a matter of public concern, and, in a different context, served as one of the underlying issues in the Civil Rights Movement of the 1950s and 1960s. The Court has been very protective of public employees' right to comment on issues of public interest, even when the speech itself would likely be reprehensible to the vast majority of the citizenry.

In 1987, the Court heard a case involving an employee of a county constable's office who was discharged for commenting to an coworker, upon hearing of an attempt on then-President Ronald Reagan's life, "if they go for him again, I hope they get him." In that case, Rankin v. McPherson, 483 U.S. 378, the Court continued to provide guidance on the practical application of the *Pickering* test:

> It is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally pro-

tected interest in freedom of speech. Perry v. Sindermann, 408 U.S. 593, 597 (1972). Even though McPherson was merely a probationary employee, and even if she could have been discharged for any reason or for no reason at all, she may nonetheless be entitled to reinstatement if she was discharged for exercising her constitutional right to freedom of expression. See Mt. Healthy City Board of Education v. Doyle, 429 U.S. 274, 284-285 (1977); Perry v. Sindermann, supra, at 597-598.

The determination whether a public employer has properly discharged an employee for engaging in speech requires "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." Pickering v. Board of Education, 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138, 140 (1983). This balancing is necessary in order to accommodate the dual role of the public employer as a provider of public services and as a government entity operating under the constraints of the First Amendment. On the one hand, public employers are employers, concerned with the efficient function of their operations; review of every personnel decision made by a public employer could, in the long run, hamper the performance of public functions. On the other hand, "the threat of dismissal from public employment is . . . a potent means of inhibit-

ing speech." Pickering, supra, at 574. Vigilance is necessary to ensure that public employers do not use authority over employees to silence discourse, not because it hampers public functions but simply because superiors disagree with the content of employees' speech. 483 U.S. 378, 383-384.

* * *

Considering the statement in context, as Connick requires, discloses that it plainly dealt with a matter of public concern. The statement was made in the course of a conversation addressing the policies of the President's administration. It came on the heels of a news bulletin regarding what is certainly a matter of heightened public attention: an attempt on the life of the President. While a statement that amounted to a threat to kill the President would not be protected by the First Amendment, the District Court concluded, and we agree, that McPherson's statement did not amount to a threat punishable under 18 U.S.C. 871(a) or 18 U.S.C. 2385, or, indeed, that could properly be criminalized at all. See 786 F.2d, at 1235 ("A state would . . . face considerable constitutional obstacles if it sought to criminalized the words that were uttered by McPherson on the day the President was shot"); see also Brief for United States as Amicus Curiae 8 ("[W]e do not think that respondent's remark could be criminalized"); cf. Watts v. United States, 394 U.S. 705 (1969) (per curiam). The inappropriate or controversial character of a

statement is irrelevant to the question whether it deals with a matter of public concern. "[D]ebate on public issues should be uninhibited, robust, and wide-open, and . . . may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." New York Times Co. v. Sullivan, 376 U.S. 254,270 (1964); see also Bond v. Floyd, 385 U.S. 116. 136 (1966): "Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected." 483 U.S. 378, 386-387. (Internal footnotes omitted).

* * *

In performing the balancing, the statement will not be considered in a vacuum; the manner, time, and place of the employee's expression are relevant, as is the context in which the dispute arose. See id., at 152-153; Givhan v. Western Line Consolidated School Dist., 439 U.S. 410, 415, n. 4 (1979). We have previously recognized as pertinent considerations whether the statement impairs discipline by superiors or harmony among co-workers, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, or impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise. Pickering, 391 U.S., at 570-573.

These considerations, and indeed the very nature of the balancing test, make apparent that the state interest element of the test focuses on the effective functioning of the public employer's enterprise. Interference with work, personnel relationships, or the speaker's job performance can detract from the public employer's function; avoiding such interference can be a strong state interest. From this perspective, however, petitioners fail to demonstrate a state interest that outweighs McPherson's First Amendment rights. While McPherson's statement was made at the workplace, there is no evidence that it interfered with the efficient functioning of the office. The Constable was evidently not afraid that McPherson had disturbed or interrupted other employees – he did not inquire to whom respondent had made the remark and testified that he "was not concerned who she had made it to," Tr. 42. In fact, Constable Rankin testified that the possibility of interference with the functions of the Constable's office had not been a consideration in his discharge of respondent and that he did not even inquire whether the remark had disrupted the work of the office.

Nor was there any danger that McPherson had discredited the office by making her statement in public. McPherson's speech took place in an area to which there was ordinarily no public access; her remark was evidently made in a private conversation with another employee. There is no suggestion that any member of the general public was present or

> heard McPherson's statement. Nor is there any evidence that employees other than Jackson who worked in the room even heard the remark. Not only was McPherson's discharge unrelated to the functioning of the office, it was not based on any assessment by the Constable that the remark demonstrated a character trait that made respondent unfit to perform her work. 483 U.S. 378, 388-390.

The Supreme Court has not allowed public employees to engage in every possible activity and then avoid discipline by a public employer by claiming Constitutional protection. In City of San Diego, California et al. v. John Roe No. 03-1669. (Decided December 6, 2004), the Court rejected the constitutional challenge Roe made to his termination. Roe, trading off his employment as a San Diego police officer, had offered for sale, via the online retail website eBay, videos showing him stripping-off a police uniform and then masturbating. Like the Grievant, Row's eBay user profile identified him as a member of law enforcement. Row's case, as described by the Supreme Court, involves several similarities to the instant dispute:

> He sold the video on the adults-only section of eBay, the popular online auction site. His user name was "Codestud3@aol.com," a word play on a high priority police radio call. 356 F. 3d 1108, 1110 (CA9 2004). The uniform apparently was not the specific uniform worn by the San Diego police, but it was clearly identifiable as a police uniform. Roe also sold custom videos, as well as police equipment,

including official uniforms of the San Diego Police Department (SDPD), and various other items such as men's underwear. Roe's eBay user profile identified him as employed in the field of law enforcement.

Roe's supervisor, a police sergeant, discovered Roe's activities when, while on eBay, he came across an official SDPD police uniform for sale offered by an individual with the username "Codestud3@aol.com." He searched for other items Codestud3 offered and discovered listings for Roe's videos depicting the objectionable material. Recognizing Roe's picture, the sergeant printed images of certain of Roe's offerings and shared them with others in Roe's chain of command, including a police captain. The captain notified the SDPD's internal affairs department, which began an investigation. In response to a request by an undercover officer, Roe produced a custom video. It showed Roe, again in police uniform, issuing a traffic citation but revoking it after undoing the uniform and masturbating.

The investigation revealed that Roe's conduct violated specific SDPD policies, including conduct unbecoming of an officer, outside employment, and immoral conduct. When confronted, Roe admitted to selling the videos and police paraphernalia. The SDPD ordered Roe to "cease displaying, manufacturing, distributing or selling any sexually explicit materials or engaging in any similar behaviors, via the internet, U. S. Mail, com-

mercial vendors or distributors, or any other medium available to the public." 356 F. 3d, at 1111 (internal quotation marks omitted). Although Roe removed some of the items he had offered for sale, he did not change his seller's profile, which described the first two videos he had produced and listed their prices as well as the prices for custom videos. After discovering Roe's failure to follow its orders, the SDPD – citing Roe for the added violation of disobedience of lawful orders – began termination proceedings. The proceedings resulted in Roe's dismissal from the police force.

A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment. See, *e.g.*, *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 605-606 (1967). On the other hand, a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public. The Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment. *See Connick, supra*; *Pickering v. Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U.S. 563. * * * To reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate

interests in performing its mission, the *Pickering* Court adopted a balancing test. It requires a court evaluating restraints on a public employee's speech to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U. S., at 568; see also *Connick, supra,* at 142.

Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. See 391 U. S., at 572. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.

Pickering did not hold that any and all statements by a public employee are entitled to balancing. To require *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices. See *Connick,* 461 U.S., at 143. This concern prompted the Court in *Connick* to explain a threshold inquiry (implicit in *Pickering* itself) that in order to merit *Pickering* balanc-

> ing, a public employee's speech must touch on a matter of "public concern." 461 U. S., at 143 (internal quotation marks omitted).
>
> The speech in question was detrimental to the mission and functions of the employer. There is no basis for finding that it was of concern to the community as the Court's cases have understood that term in the context of restrictions by governmental entities on the speech of their employees.

Unlike Roe, the Grievant's web posting dealt with an issue that was of "substantial concern to the public" – the enforcement or lack of enforcement of laws based on race.

Inter alia, Management has directed the Arbitrator to a case from Florida, McMullen v. Carson, 754 F.2d 936 (1985),in which the Eleventh Circuit upheld the discharge of a sheriffs department employee due to his involvement with the KKK, and a recent Supreme Court decision, Garcetti v. Ceballos, 547 U.S. ___ (2006), No. 04-473, decided May 30, 2006, in which the Court upheld the discharge of a calendar deputy in the Los Angeles County District Attorney's Office, Richard Ceballos ("Ceballos"), who was fired when he wrote a memorandum that questioned the accuracy of an affidavit used to obtain a search warrant.

In *McMullen* a clerical employee in the Duval County Sheriffs office, in Jacksonville, Florida, was fired after he was interviewed on a locally televised news broadcast as a recruiter for the Ku Klux Klan. The employee had obtained an appli-

cation form to join the Invisible Empire of the Knights of the Ku Klux Klan in September 1981. A month later he began employment with the Sheriffs office. According to the Court, "Plaintiff performed his duties in exemplary fashion. He was courteous, conscientious, and got along well with his fellow records section employees." 568 F. Supp. 937. The Grievant also quickly took on a public leadership role with the KKK, which lead to violence:

> By January 1982 plaintiff had become a Klan recruiter. He recruited on his own time by distributing Klan literature in various public areas.
>
> Shortly after vandals left a cross in the yard of a Jacksonville black woman's home, plaintiff and Bill Wilkinson, "Imperial Wizard" of the Invisible Empire, the Klan faction to which plaintiff belonged, held a news conference disclaiming Klan involvement in the vandalism. Plaintiff identified himself as a Klan recruiter and as a Sheriffs office employee. The interview was broadcast on the evening news before an estimated audience of 117,000 to 182,000 adult viewers. Both television and newspaper media followed up on plaintiffs status as a Klan recruiter in the Sheriffs office.
>
> Instant and strongly negative reactions in the black community resulted from the initial reports of plaintiff's Klan activities. The Jacksonville Urban League reported approximately 200 telephone calls and live com-

ments from individuals concerned about the existence of a Klansman in the Sheriffs office. Many comments reflected the notion that Jacksonville blacks should resist arrest by Sheriffs personnel for fear of their lives.

Sheriff Carson learned of plaintiff's activities from this media coverage. Fearing for his department's ability to effectively perform its duties, Carson dismissed plaintiff immediately. Carson testified he thought retaining plaintiff would lead to serious morale problems in his department and would interfere with its affirmative action plan.

Ten days after he was fired, plaintiff, his wife, Bill Wilkinson, and three others marched to the Duval County Courthouse in their hoods and robes to protest plaintiff's dismissal. Despite NAACP and local religious leaders' admonitions to stay away, a crowd of two to three hundred people attended the rally. Angry anti-Klan sentiments were shouted and some minor violence broke out, but it was quickly subdued by the police. 568 F. Supp. 937. (Internal footnotes omitted).

The facts in *McMullen* are clearly distinguishable from the instant matter. In *McMullen* the Court faced a situation where the employee in question was actively serving as a recruiter for the KKK, went on television to proclaim his support of the Klan, and, in the process, also identified himself as an employee of a Sheriff's office that had severely strained relations with

the black community. Ultimately, actual civil disruption occurred in Jacksonville. The Grievant joined a web site, he never expressed racialist views in any way likely to be seen by the general public, he did not recruit, he kept his online activities to himself and only posted under a pseudonym, and no disruptions occurred as a result of his behavior.

In *Garcetti,* the Court found that the First amendment did not protect an employee who claimed his employer retaliated against him when he encountered a situation at work with which he disagreed and, within the normal confines of his job, issued a memorandum critical of his employer. For the Court, the key to finding that Ceballos' employer did not infringe upon his First Amendment rights was its determination that Ceballos prepared his memorandum as an integral part of his job. Specifically, the court held:

> The controlling factor in Ceballos' case is that his expressions were made pursuant to his duties as a calendar deputy. See Brief for Respondent 4 ("Ceballos does not dispute that he prepared the memorandum 'pursuant to his duties as a prosecutor'"). That consideration – the fact that Ceballos spoke as a prosecutor fulfilling a responsibility to advise his supervisor about how best to proceed with a pending case – distinguishes Ceballos' case from those in which the First Amendment provides protection against discipline. We hold that when public employees make statements pursuant to their official

> duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." Slip Opinion, at 9.

The instant fact pattern is clearly distinguishable from Ceballos' situation in *Garcetti*. While Ceballos was performing his job when he wrote his memorandum, the Grievant was in his home, and on his own time, when he accessed the Knight's Party website. Since the Grievant was not speaking online as part of his official duties, under the Supreme Court's holdings the Grievant retained his First Amendment Right to speak out on issues of a public interest.

Other Courts have found, even in cases with such egregious behavior as that exhibited by New York City police officers in re. Locurto v. Giuliani, 269 F.Supp. 368 (S.D.N.Y. 2003), that public employees, including police officers, are entitled to broad First Amendment protection. In *Locurto,* the employees, which included police officers and firefighters, wore blackface, used mops to form "afro"-style hair, and were accompanied by a bucket of fried chicken and watermelons. As the parade moved down its route, the employees in question engaged in chants that protesters in the civil-rights era often used. The City of New York fired the employees in question but the Court found that their termination violated their right to free speech.

As with the instant dispute the Court in Locurto was faced with an employer argument that

focused on "anticipated reaction to the speech by certain offended groups within the city," and whether "potential disruption to the department's external operations – specifically community relations and minority recruitment" would outweigh the employees' free speech interests. The Court held it did not:

> However, assuming *arguendo* that the testimony offered on potential external disruption is sufficient as a factual manner for defendants to carry their burden . . . the Court concludes that such disruption, which is solely external and based on feared community reaction to plaintiffs' speech, is insufficient, as a matter of law, to outweigh plaintiffs' interests in engaging in controversial, off-duty speech unrelated to the workplace and regarding a matter of public concern. 269 F.Supp. 368, 397-98.

The Courts have been willing to limit public employees' free-speech rights when the speech sufficiently disrupts internal operations; however, with respect to the instant matter, the State Patrol has failed to show any actual or reasonably-anticipated internal disruptions as a result of the Grievant's association with the Knight's Party, Christian Concepts, or the KKK. The State Patrol did not show any minimally-persuasive evidence that the Grievant's actions or beliefs would cause disruptions in the Grievant's ability to effectively work with the Patrol's black Troopers, or that the Grievant's actions or beliefs would cause the Patrol difficulties with respect to

the morale, efficiency, or good order of the State Patrol.

The Arbitrator cannot sufficiently emphasize the revulsion he feels towards the racialist philosophies of the Knights Party, Christian Concepts, and the Ku Klux Klan. Throughout the Hearing, and while reviewing the parties post-hearing submissions, and during an independent review of judicial rulings concerning the First Amendment Rights of public employees in general, and police officers in particular, the Arbitrator has stood willing to be persuaded that the State Patrol was justified in discharging the Grievant for joining the KKK – under whatever mask it presents itself to the public: e.g., Christian Concepts or the Knight's Party.

It is very likely that, under *Pickering, Connick,* and the other related decisions of the United States Supreme Court, the State Patrol could have successfully defended the constitutionality of its decision to terminate the Grievant by either showing some actual harm to its ability to maintain discipline and good order within the ranks, or by showing some actual diminution in the State Patrol's ability to perform its police function.

That said, the State Patrol bore the burden of showing such disruptions, and the Patrol failed to meet this burden. In the final analysis, all that the Agency presented to the Arbitrator was surmise and speculation that some operational or community-relations harm could occur; this was

precious little upon which to hang the "hat" of deciding to terminate the Grievant.

Although the Constitutional violation is sufficient to sustain the Grievance, the Patrol's discharge would have to be set aside, absent the Constitutional deficiencies, due to Management's violation of the CBA.

The Contract regulates how the Agency may conduct investigations of Troopers. The Department's own SOPs and Policies both reemphasize those Contractual requirements and provide additional guidance to Agency employees who conduct employee investigations. Of particular interest are SOP52-1 Number 10-01-01 (Notification of Employee), SOP52-1 Number 11-01-01 (Waiver of Notification of Employee), SOP52-1 Number 12-01-01 (Investigation of Internal Affairs Complaints), and SOP52-1 Number 13-01-01 (Extension of Internal Affairs Cases). Insofar as these rules are extra-Contractual, it is important to ascertain the legitimacy of these SOPs. A review of the Record shows no evidence that the Union ever grieved the adoption of these SOPs or that they were adopted in a secret fashion and were unknown to the Union, and therefore, could not be grieved. As such, the Arbitrator accepts them as legitimately-adopted work rules. Inasmuch as these procedures were unilaterally adopted by the Employer, the Agency must be held to strict account in following these SOPs; clearly, the right to unilaterally adopt work rules is a double-edged sword.

Although it strikes the Arbitrator as an excessively-long period, the Arbitrator will not attempt to second guess why it took Kinghorn over a month to obtain a post office box, which he determined was necessary in order to fully-investigate the nature of the Knight's Party web site. The Arbitrator accepts that Kinghorn properly obtained an extension of the time-limit by which he was obliged to complete his investigation, which, after the extension he was obliged to complete his investigation by January 15, 2005, Kinghorn did not come close to meeting this timeline and did not even bother to seek another extension until January 18, 2006.

Even if the Arbitrator, for argument's sake, completely ignored the Agency's obligation to notify the Grievant of the first extension – as somehow permitted in the interest of preserving the effectiveness of an undercover investigation – the Arbitrator cannot conceive of why Kinghorn failed to meet the new forty-five- (45-) day limit, or why he failed to seek another extension prior to the expiration of the first extension. For the purpose of conducting this investigation, Kinghorn was the Agency. Insofar as he failed to meet his timelines, so did the State Patrol. The Arbitrator was given no compelling reason to excuse Kinghorn's failure – there was no incapacitation, no stranding in a foreign airport, no rush to a maternity ward, or any other reason that a reasonable person might conclude would toll the time limit.

This double extension, the failure to timely-seek the second of these extensions, and the

snails-pace at which the investigation of the Grievant's association with the Knight's Party website (and any affiliated groups) provides a clear and unambiguous signal that the Agency did not seriously consider the Grievant's activities to be a hindrance to his performance, a threat to the efficient operations of the State Patrol – a politically messy problem, perhaps, but not a drag on the Grievant's performance or a threat to the operation of the Agency. Every day that the Internal Affair's investigation crawled along, the Grievant – who the Agency would have the Arbitrator believe is a loose cannon who is a threat to any minority motorist he encounters – was alone, patrolling the roads of the Omaha area, free to target minorities at will.

The Union has objected to Management's refusal, until the day of the Hearing, to reveal the name of the agency whose tip led to the initiation of the investigation of the Grievant. The Arbitrator observes that there is no credible evidence in the Record to support the contention that the Kansas Bureau of Investigation is an "informer," within the meaning of 27-50, Rule 510. Two other points of contention are whether the State Patrol improperly issued administrative subpoena's to begin its investigation of the Grievant's online activity and whether the State Patrol properly waived notification of the Grievant.

Given the multitude of deficiencies in the Internal Affairs' investigation, the fact that the Grievant was denied knowing the identity of the agency that triggered the investigation into his online activities, and the possibility that both the

waiver and the issuance of the subpoenas were also improper did not ultimately prejudice his appeal. The Arbitrator observes that, when the investigation commenced and until he had access to the members' only portion of the Knight's Party web site, Kinghorn did not know whether or not the Grievant was in fact involved in criminal activities or other "serious misconduct." Hindsight shows that the Grievant did not engage in serious misconduct, as defined in 03-19, but at the time Kinghorn sought the waiver and the subpoenas, he did not have the hard evidence to reach that determination.

Perhaps, if the Internal Affair's investigation had been thorough and complete, there would be more in the Record to support the Agency's decision to terminate the Grievant's employment. It is hard to conceive of another investigation taking so long to produce so little evidence of alleged misconduct. This may be because Kinghorn was new to his job in Internal Affairs. Still, new or not, he jumped to conclusions – perhaps reasonably so – at the beginning of the investigation. The Arbitrator suspects that most police officials would have the hair on their neck stand on end were they to learn one of their officers was a member of the KKK. Nevertheless, with even a cursory attempt to conduct the type of investigation that just cause demands, it would have become clear to the Agency that the Grievant was not a white-hooded, cross-burning, terrorist.

With respect to the Agency's assertion that the Grievant violated 03-08, II, F., 3 – Association with Known Felons/Criminal Behavior,"

there is not a scintilla of credible evidence that the Grievant committed this offense. The State Patrol did not present any testimony or documentary evidence to prove (or even to strongly suggest) that the Grievant had any contact with anyone who had any criminal record, let alone had "regular or continuous associations" with such individuals.

Although there is no question that various branches of the KKK have a long history of violence and intimidation, and that members of some branches of the KKK have a history of engaging in criminal behavior, there is no credible evidence that the Grievant had any interactions, either in person, online, or via any other form of communication with any such branch of the KKK or any individual member who has engaged in any criminal behavior.

The Record clearly shows that the names "Ku Klux Klan" and "KKK" are in the public domain, and not owned by any single organization. As such, any group with a desire to use those names may do so. Some of these groups are clearly violent and or criminal. The Record shows no act of violence or criminal activity even alleged, let alone proved, against the group the Grievant joined, the Knight's Party. The same holds true for "Christian Concepts."

Insofar as the Grievant stated in his interview that the Knight's party is the KKK, the Arbitrator accepts that determination. While it is also significant that the group with which the Grievant affiliated was ultimately led by Thomas

Robb, one of the more well known KKK leaders. This fact should have made it easier for Kinghorn's investigation to determine that the group the Grievant joined – while holding ideals largely discredited by the majority of society and repulsive to most people – had shunned violence and illegal activities. This was not some shadowy unknown group about which little was known.

In fact, in her May 17, 2006 e-mail to Kinghorn, Sheri King said of Robb, "This is a guy who was trying to create a 'kindler gentler' Klan" and that he has "honed [David] Duke's strategy of divorcing the KKK from its violent past . . . " and that "Robb's ostensible moderation in comparison to former Klan heads has led to a major splintering of the Knights [of the Ku Klux Klan]."

The fact that the Grievant chose to join a website frequented by racialists is not enough to prove the Grievant had associated with known felons. One may find the members to be pathetic, or twisted, or even that their expressed views are unwise or ultimately dangerous to civil society, nevertheless, there is no support within the Record that they are felons.

The Arbitrator suspects strongly that, had Kinghorn conducted the most cursory investigation into the current state of the KKK – before determining that the charges he was investigating were "founded." instead of waiting to do the research in preparation for the Hearing – Kinghorn would himself have discovered that the Knight's Party, as distasteful as its members' views might be to him or to others, was not the

KKK of his and the public's fears and that the KKK itself is not a monolithic, centrally-controlled organization.

Above the objection of the Union, the Arbitrator allowed the State Patrol to introduce evidence concerning the history and current state of the KKK. Management's own documents describe the KKK, in general, as a spent force. This is not to say that there are not dangerous Klan groups, but the Agency's own documents – largely pulled off the internet and as readily available in November, December, or January as they were in May – make clear that the Grievant was not a member of a den of terrorists. Are there criminals affiliated with the Knight's Party? The Record is devoid of any evidence that there were. If the Agency had serious concerns about the possible criminal nature of the members of the Knight's Party website, the Arbitrator is persuaded that it would have obtained the Internet Protocol addresses of all the visitors to that web site, identified the users – much as it used the administrative subpoenas to identify the Grievant – and then uncovered any criminals amongst the users. If the Internal Affairs investigation had focused on identifying this type of data, rather than trying to peer into the Grievant's soul, the Arbitrator might have been able to uphold the Grievant's discharge.

Even if the Arbitrator were inclined to ignore the Constitutional deficiencies in the Department's actions, and to further ignore the Agency's failure to meet its own timelines, the Arbitrator would still be obliged to overturn the discipline

based on a violation of just cause because of the insufficiency of the investigation carried out to ascertain whether the Grievant was guilty of any punishable offenses. From the time the Agency heard "KKK," it appears that the Grievant's fate was all but sealed. Whether the rush to discharge the Grievant was a good-faith attempt to purge the Agency of a possible "cancer," or a politically-expedient way of addressing a potential public relations disaster, is of little moment.

Management's assertions that the Grievant engaged in conduct unbecoming and a violated the Code of Ethics due to his private conduct fails, not only because of the Constitutional reasons cited above, but also on the basis of just cause. The Grievant's interaction with the Knight's Party occurred in the privacy of his own home, under a pseudonym, and – had the Agency not acted – his actions would never have called any unwanted public attention upon the Agency. This is not to say that the Arbitrator believes the Agency was wrong to press ahead with the Internal Affair's investigation; it was a responsible and reasonable thing to do. At the time that the 801 was filed, there was no way of knowing the nature of the Group that the Grievant had joined, the level of his commitment to that organization, and any illegal activities he may have committed on behalf of that organization. Nevertheless, in short order, it should have been evident that the Grievant was, in the privacy of his home, through a pseudonym, simply seeking to talk to others who share his philosophies. The Grievant was not at rallies, or writing letters to newspaper editors, or leafleting, or appearing on television

shows expressing thoughts or philosophies that the citizens of Nebraska might find objectionable, and which would either bring "the State Patrol into disrepute" or reflect "discredit upon the employee as a member of the State Patrol" or impair "the operation or efficiency of the State Patrol or the employee."

10-03 states "The community and the service require that the law enforcement officer lead the life of a decent and honorable person. * * * they will so conduct their private life that the public will regard them as an example of stability, fidelity and morality." The Agency provided neither credible testimony nor evidence that the Grievant violated this rule. Had the public become aware of the Grievant's, online activity, through some mechanism aside from the Agency's investigation, the Arbitrator might have been able to find just cause to discipline the Grievant. Given the Record, this is not possible.

True enough, the Grievant came pretty close to being reckless when he posted online an e-mail address and a telephone number where other "klansmen" and "klanswomen" could contact him, but even the State Patrol was unable to connect those two points of contact to the Grievant without resorting to issuing subpoenas. The Grievant may have personal philosophies that would disgust many citizens of Nebraska, nevertheless, he has well-hidden those beliefs and they have not interfered with his impartial enforcement of the law. The Arbitrator has been persuaded that, to just about anyone he knows or interacts with professionally, the Grievant projects himself as "an

example of stability, fidelity and morality." Furthermore, there is no evidence or credible testimony that the Grievant's affiliation with the Knight's Party/KKK impaired "the operation or efficiency of the State Patrol or the employee" or that his reinstatement will likely impair "the operation or efficiency of the State Patrol or the employee."

Much was made at the Hearing about the Grievant's "lifetime" membership in the KKK. Despite whatever the membership card he received with his password to the web site may say, it was not a lifetime membership. It may have been a lifetime membership on the groups fundraising list, but the kinghtsparty.com website required annual membership payments to obtain access to the content that was of greatest interest to the Grievant. As to the nature of that content, the Arbitrator is perplexed that the Agency did not copy more of the content from the Knight's Party web site. If the web site was filled with content that would be objectionable to the sensibilities of the populous of the State of Nebraska, it might have supported the Agency's claim that it had a reasonable expectation of disruption to civil order as a result of the Grievant's association with the web site.

Had the State Patrol carefully identified the nature of the group the Grievant joined – before firing him, rather than in preparation for the Hearing – it may have been in a position to keep an eye on the Grievant. The State Patrol has video cameras in its patrol vehicles, so it would be easy enough to verify a citizen complaint against

the Grievant. The State Patrol also collects data on Troopers' traffic stops. This data could have been monitored for evidence of bias. Instead of focusing on actions, for which discipline can be administered, the Agency fixated on the Grievant's personal beliefs.

The Arbitrator is cognizant of the State Patrol's deep interest in conducting fair investigations and in administering discipline in a fair and measured way, consistent with the Contractual just cause standard. The Arbitrator fully accepts that the three-person committee that recommended termination, and the Superintendent who accepted and executed that recommended discipline, acted in good faith, with integrity, and with the intention of complying with the Contract. The Arbitrator also accepts that Kinghorn acted in good faith and with integrity, and was motivated by the highest ideals of the State Patrol. Unfortunately, the foundation upon which the determination to discharge was based was poorly constructed, and unable to sustain the weight of just cause, let alone a Constitutional challenge.

For all these reasons, the Grievance is sustained.

XII. *Award and Order*:

Accordingly, the undersigned Arbitrator, designated by the State of Nebraska, Department of Administrative Services, having received and considered all arguments, evidence, and statements offered by the parties, even if not set forth or discussed above, issues the following Award:

The Grievance is sustained.

1. The Nebraska State Patrol is hereby ordered, within sixty (60) days of the date of this Award, to reinstate the Grievant, Robert Henderson, to the position he held on March 2, 2006;

2. The Nebraska State Patrol is also hereby ordered, within ninety (90) days of the date of this Award, or within thirty (30) days of his reinstatement, whichever occurs sooner, to make the Grievant, Robert Henderson, whole for all wages he lost as a result of his suspension and subsequent discharge, and to restore to the Grievant, any seniority, leave, or other benefits – including contributions to all applicable retirement plans and health insurance plans – that he lost or had reduced as a result of his suspension and subsequent discharge and to remove from the Grievant's file all references to his suspension and his discharge.

3. The Nebraska State Patrol may deduct from the back-pay due, pursuant to two above, the value of any wages earned by the Grievant at any job he did already hold on or before March 2, 2006;

4. If the State Patrol fails to reinstate the Grievant or to make the Grievant whole for lost wages, lost retirement contributions or lost health insurance premiums – pursuant to numbers one (1), two (2), or three (3), above – the Grievant shall

be entitled to interest at the rate of eighteen percent (18%) per annum (or the maximum amount allowed under Nebraska State Law, whichever is less), calculated daily, on all monies due, from March 15, 2006 onward, until such time as the Grievant is paid in full. If the State Patrol makes the Grievant whole for all his lost wages, lost retirement contributions or lost health insurance premiums – pursuant to numbers one (1), two (2), and three (3), above and within the timelines specified within this Order – the Grievant will not be entitled to any interest;

5. The Grievant, Robert Henderson, is hereby ordered to provide the Nebraska State Patrol, within thirty (30) days of the date of this Award, documentation in the form of pay-stubs, of all jobs he held for the six- (6-) month period before March 2, 2006, and those he has held since that time. If the Grievant fails to comply with this order, within the stated timeframe, the State Patrol's obligation to pay interest under four (4), above, will cease;

6. Nothing in this Award shall prevent the Nebraska State Patrol from reassigning the Grievant in the future, if necessary to maintain the good order and efficiency of the Agency, or to eliminate/mitigate actual civil disruptions that may occur as a result of the public becoming aware

of the Grievant's association with the Knight's Party, Christian Concepts, the Ku Klux Klan, or any other such group;

7. The Arbitrator will retain jurisdiction over this award for the limited purpose of calculating the back-pay due (should the parties be unable to reach agreement on that amount) and to address any issues concerning the implementation of this Award, until such time as the parties jointly notify the Arbitrator – in writing via Registered Mail return-receipt – that they wish to remove his jurisdiction from this matter.

Respectfully submitted,

/s/ Paul J. Caffera
Paul J. Caffera, Arbitrator

Dated: August 17, 2006

State of New York)
County of Monroe) SS

On this 18th day of August, 2006 before me personally came Paul J. Caffera, to me known and known to me to be the individual described, in who executed the foregoing instrument and he acknowledged to me that he executed the same.

/s/ Stephanie M. Caffera
Notary Public

STEPHANIE M CAFFERA
Notary Public, State of New York
No. 02CA5075496
Qualified in Monroe County
Certificate Filed in Monroe County
Commission Expires April 7, 2007

IN THE DISTRICT COURT
OF LANCASTER COUNTY, NEBRASKA

STATE OF NEBRASKA, Plaintiff, v. ROBERT HENDERSON, and THE STATE LAW ENFORCEMENT BARGAINING COUNCIL, Defendants.	)	Case Number: CI 06-3455 ORDER

On March 15, 2006, Robert Henderson, a patrolman with the Nebraska State Patrol, was terminated from his employment on the grounds that he had violated Patrol policies and procedures by reason of his membership in the Knights Party, an organization which advocates a "white Christian revival" and is affiliated with the Ku Klux Klan. Following an internal investigation, the investigator recommended that the allegations against Henderson be "founded." A Conduct and Procedures Review Meeting was held which resulted in a recommendation that Henderson be terminated. The Superintendent of the Patrol accepted the recommendation and terminated Henderson.

Henderson grieved his termination pursuant to the applicable collective bargaining agreement; the grievance appeal was rejected by the Patrol. Pursuant to the terms of the collective bargaining agreement, the matter was submitted to arbitration which,

under the agreement, is final and binding on the parties. Following a hearing on June 2, 2006, the arbitrator issued an opinion dated August 17, 2006, finding that the actions of the Patrol violated the collective bargaining agreement in that the termination violated Henderson's Constitutional right of free speech and association and the Patrol failed to prove that Henderson's actions brought the Patrol into disrepute, impaired the Patrol's efficiency, or reflected "discredit upon the employee as a member of the State Patrol." The arbitrator ordered that Henderson be reinstated to his position as a trooper and awarded back pay, seniority and other benefits. The Patrol filed this action pursuant to NEB. REV. STAT. § 25-2613 (Cum. Supp. 2004) seeking to vacate the arbitrator's award.

Section 25-2613 sets forth six specific grounds under which an arbitrator's award can be vacated by this court, including fraud, partiality of the arbitrator, exceeding the arbitrator's powers, refusal to continue the hearing, the lack of an enforceable arbitration agreement, or the arbitrator's lack of qualifications. It does not appear that any of these conditions exist in this matter. Section 25-2613 also provides that "[t]he fact that the relief was such that it could not or would not be granted by a court of law or equity is not grounds for vacating or refusing to confirm the award." In other wards, this court has no power to re-weigh the evidence presented to the arbitrator and cannot vacate or modify the arbitrator's decision even if this court disagrees with the

decision or finds that the decision is not supported by the evidence.

Although the Patrol's motion to vacate and brief contends that the arbitrator was not impartial and exceeded his powers, counsel for the patrol, during oral argument, substantially conceded that there is no evidence to support these contentions. The Patrol argues that the decision should be vacated on the grounds that reinstating a trooper who has belonged to an organization which embraces racial bias and racial superiority is contrary to the clearly defined, dominant public policy of the State of Nebraska.

In its initial brief on page 5, the Patrol contends that our court has recognized the rule that arbitration awards may be vacated if the award violates public policy stating "[t]his exception [public policy] to the enforcement of arbitration awards has also been recognized by the Nebraska Supreme Court. *Cornhusker Inter. Trucks, Inc. v. Thomas Built Buses, Inc.*, 263 [sic] 10, 16-17, 637 N.W.2d 876, 881-82 (2002)." I have reviewed this case and find no language therein that supports this statement. However, other jurisdictions have held that arbitration awards that contravene a well-defined and dominant public policy may be vacated. In *State v. AFSCME, Council 4, Local 387,* 252 Conn. 467, 747 A. 2d 480 (2000) the Connecticut Supreme Court upheld the vacation of an arbitration award reinstating a correctional officer who had been terminated for leaving a profane and racist message on the voice mail of a state legislator. Connecticut's statute on vacating arbitration awards is

virtually identical to NEB. REV. STAT. § 25-2613 (Reissue 1995). Quoting from *Watertown Police Union Local 541 v. Watertown,* 210 Conn. 333, 339-40, 555 A. 2d 406, ___ (1989) the court stated that the challenge to an arbitrator's award:

> . . . is premised on the fact that the parties cannot expect an arbitration award approving conduct which is illegal or contrary to public policy to receive judicial endorsement any more than parties can expect a court to enforce such a contract between them. . . . When a challenge to an arbitrator's authority is made on public policy grounds, however, the court is not concerned with the correctness of the arbitrator's decision but with the lawfulness of enforcing the award. . . . Accordingly, the public policy exception to arbitral authority should be narrowly construed and [a] court's refusal to enforce an arbitrator's interpretation of [collective bargaining agreements] is limited to situations where the contract as interpreted would violate some explicit public policy that is well defined and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. . . . The party challenging the award bears the burden of proving that illegality or conflict with public policy is clearly demonstrated. . . .

State v. AFSCME, Council 4, Local 387, supra at 474-75, 747 A. 2d at 485. The Connecticut Supreme Court applied a two step analysis, that is, (1) whether there

is an explicit, well-defined and dominant public policy and, if so, (2) whether the award violates such public policy.

This two-tiered analysis also was applied in *Exxon Corporation v. Esso Workers' Union, Inc.*, 118 F.3d 841 (1st Cir. 1997), relying upon *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987), where the court stated:

> Misco teaches that, though courts may set aside arbitral awards which contravene public policy, they may do so only in a narrow class of cases, marked by a special set of circumstances. See id. at 43. To determine whether a particular case fits within the confines of this class, courts must employ a two-tiered analytic approach. First, since a generalized sense of public policy provides an insufficient basis upon which to annul an arbitral award, an inquiring court must review existing statutes, regulations, and judicial decisions to ascertain whether they establish a well defined and dominant public policy. If positive law does not give rise to such a policy, the inquiry is at an end. See id. at 43-44. If, however, the court finds that such a policy exists, it must then proceed to the second step of the pavane and determine whether the arbitral award clearly violates the discerned public policy.

118 F.3d at 846.

The First Circuit, after applying this analysis, upheld the firing of a long-distance truck driver who

failed a drug test, thus overturning the arbitrator's award.

Applying this two-tiered analysis to this case, there can be no question of the existence of a well defined and dominant public policy of this state against discrimination based on race, sex, creed, or national origin. Such policy clearly is evidenced by our Constitution, our statutes and as well as the Policy and Procedures Manual of the Patrol. In fact, the arbitrator in his award recognized this policy when he stated at pages 26 and 27 as follows:

> When Trooper Robert Henderson chose to join the Knights Party.com website in June of 2004, he set forth a series of events that will likely have repercussions for the Nebraska State Patrol and his own life and career for many years to come. The Arbitrator questions whether the Grievant will ever fully repair his reputation within the State Patrol. The disgust that the Nebraska State Patrol command staff has expressed regarding the Grievant's decision to align himself with the Ku Klux Klan, through his KnightsParty.com membership, is shared by the Arbitrator. The Arbitrator cannot begin to fathom the level of disgust, fear, or apprehension that citizens who are members of groups traditionally victimized by various factions of the KKK would feel when pulled over for a traffic stop (or otherwise detained) by a member of a police agency that is known to have employed, or to employ a member (or former member) of the KKK. That said, and

> personal revulsion aside, the Arbitrator has been persuaded that the Nebraska State Patrol violated the Collective Bargaining Agreement when it discharged the Grievant because of his association with the Knights Party web site, Christian Concepts, and the Ku Klux Klan.

Since the well defined and dominant public policy of this State against discrimination is clear, the only remaining question is whether the arbitrator's award reinstating a Trooper of the Nebraska State Patrol who belonged to an organization such as the Knights Party, violates such policy. This court finds that it does. All citizens must have faith that the enforcement and application of the laws of this State are done impartially and fairly. Just as members of the judiciary must conduct themselves in a manner that does not raise suspicions of distrust, so must law enforcement officers. Contrary to the conclusion of the arbitrator, there are a few of us who have chosen certain professions that, because of the public interest and perception of our duties, do not permit us to engage in conduct that jeopardizes the confidence of the public in our institutions. Because this court has found that the arbitrator's award violates a well-defined and dominant public policy of this state, it must be vacated. In reaching this decision this court has accepted the factual findings of the arbitrator as true but has vacated his conclusions.

IT IS ORDERED that the motion to vacate the arbitration award be sustained and that the arbitration award dated August 17, 2006 be vacated. The motion to confirm the arbitration award is denied. Costs are taxed to the defendants.

Dated December 13 2006.

BY THE COURT:

/s/ Jeffre Cheuvront
Jeffre Cheuvront
District Judge

IN THE SUPREME COURT OF NEBRASKA

State of Nebraska and The Nebraska State Patrol, Appellees, v. Robert Henderson and the State Law Enforcement Bargaining Council, Appellants.	No. S-07-010. ORDER FOR REARGUMENT AND SUPPLEMENTAL BRIEFING (Filed May 29, 2008)

On the Court's own motion, this matter shall be reargued during the September 2008 session of this Court, which is scheduled for September 2 through 5.

The parties are directed to notify the Clerk of the Supreme Court by June 13, 2008, if they are not able to appear for reargument on any date during the September 2008 session.

The parties are further directed to file supplemental briefs on the following issues on or before August 1, 2008. Both parties are permitted to file reply briefs by August 15, 2008.

1. Can judicial review of public policy or constitutional questions be limited or eliminated by a collective bargaining agreement involving a governmental employer?

2. Does public policy forbid the enforcement of a contract which would submit to arbitration whether membership in a white supremacist organization

with ties to the Ku Klux Klan constitutes just cause for discharge from the Nebraska State Patrol?

3. Is the public policy exception recognized in *W.R. Grace & Co. v. Local Union 759*, 461 U.S. 757, 103 S. Ct. 2177, 76 L. Ed. 2d 298 (1983); *United Paperworkers Internat. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987); and *Eastern Assoc. Coal Corp. v. United Mine Workers*, 531 U.S. 57, 121 S. Ct. 462, 148 L. Ed. 2d 354 (2000), applicable where an arbitrator determines that a public employee has been discharged in violation of his constitutional rights and orders his reinstatement?

4. If the public policy exception is applicable, what is the significance of employment as a law enforcement officer on the determination of public policy?

DATED: May 29th, 2008.

BY THE COURT:

/s/ John F. Wright
John F. Wright
Chief Justice Pro Tempore

Case No. S-07-000010

IN THE SUPREME COURT OF
THE STATE OF NEBRASKA

STATE OF NEBRASKA and
THE NEBRASKA STATE PATROL

Appellees

v.

ROBERT HENDERSON and THE STATE LAW
ENFORCEMENT BARGAINING COUNCIL

Appellants

Proceedings had before THE NEBRASKA SUPREME COURT, 2nd Floor State Capitol, Lincoln, Nebraska, on September 3, 2008.

SUPREME COURT MEMBERS:

Justice John Wright
Justice Michael McCormack
Justice John Gerrard
Justice Richard Sievers
Justice William Connolly
Justice Kenneth Stephan
Justice Lindsey Miller-Lerman

[2] APPEARANCES:

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-and-
Mr. Michael B. Kratville
Attorney at Law
11920 Burt Street
Suite 145
Omaha, NE 68154 for Appellants

[3] CERTIFICATE

I, Lori J. McGowan, Court Reporter, do hereby certify that the within and following complete transcript contains all the argument requested to be transcribed by me from the proceedings had in the foregoing cause in said court; and that said complete transcript is a correct and complete transcription of the argument requested to be transcribed from the record made at the time of said proceedings.

Dated this ___ day of ___, ___.

_____
Court Reporter

[4] (At 10:30 a.m., the following proceedings were had:)

JUSTICE WRIGHT: For the record this case is State versus Henderson. Chief Justice Heavican is recused, and Judge Sievers of the Court of Appeals will replace Judge Heavican.

Counsel, are you ready to proceed?

MR. VALENTINO: I am ready.

JUSTICE WRIGHT: You may proceed.

MR. VALENTINO: May it please the Court, my name is Vince Valentino. I represent Robert Henderson and also the State Law Enforcement Bargaining Council.

I'd like to reserve two minutes for a warning.

JUSTICE WRIGHT: Counsel, we will give each side 15 minutes if you need that. So –

MR. VALENTINO: Thank you.

I wanted to discuss with you briefly the three cases that were pointed out in the Court's argument, preargument order, W. R. Grace, Misco and Eastern Coal.

[5] And I wanted to tell you that in 1983 and '87 and in 2000, those cases came to the United States Supreme Court. They came to the United States Supreme Court based upon public policy arguments. And the Supreme Court developed in those three

cases and started to refine in those three cases if and when a public policy exception may actually be created to a binding arbitration award.

And they were very specific in what they talked about was to be applied in those cases. I think it's noteworthy that in W. R. Grace and United Paperworkers versus Misco and Eastern Coal, that the United States Supreme Court refused to accept the public policy arguments that were proffered by the employer to upset the arbitration award.

JUSTICE MILLER-LERMAN: Would they be public or private employers?

MR. VALENTINO: They were – they were private employers. But in several instances, they involved public regulatory issues. in other words, there were cases where they had individuals who would be necessarily regulated in some fashion or another by – by [6] various public entities. And so –

JUSTICE MILLER-LERMAN: I'm sorry. As in regulated industry?

MR. VALENTINO: Well, for instance, I think one of them, I think Eastern Coal and United Mine Workers, they talked about various federal acts that would or would not apply to the particular person involved.

And so when the – when the federal courts began to interpret Grace, Misco and Eastern Coal, they did

apply it in the context of federally regulated industries, railway industries, nuclear power plants, gas distribution facilities.

Now, I want to also tell you that there shouldn't be any real difference between what you do as a private employer to what you do as a public employer when it comes to arbitration awards and when it comes to disciplinary actions.

We are regulated by the Nebraska State Patrol and the State of Nebraska with respect to our bargaining agreement. Our bargaining agreement specifically deals with binding arbitration.

[7] And, Bob, if you would be so kind as to put Article 8, Exhibit 2, up.

First of all, I'm going to talk to you about Exhibit 1 just for a minute. Most of you have seen this before in a prior argument. Judge Sievers has not.

This was the agreement that we signed which is pursuant to a contract that we have with the State of Nebraska. We've had this contract ever since – in one form or another ever since 1987 when the State of Nebraska actually recognized state employees as capable of bargaining for their employment rights.

And so over the years, we've had these provisions essentially in our agreement until, however, binding arbitration was made constitutional did we ever end up with actually using arbitration. We used to use

hearing officers and the State Personnel Board system recommendation until the constitution was changed to allow for binding arbitration.

Thereafter – go ahead and put up the other exhibit. Thereafter, we have this provision in our contract. And that is specifically that the arbitrator selected will [8] hold a hearing, issue a decision within 30 days of the hearing. The arbitrator's decision shall be in writing, set forth his and her findings of fact and reasoning. Arbitrator cannot amend, modify, nullify or add provisions to the agreement. And it's binding on both the agency and the council on both parties.

This is a typical arbitration agreement that you see in all of the contracts that have come before the various courts, whether they're federal or state. This is a typical arbitration proceeding provision. And it is binding. And it is final.

Now, the legislature has not in Nebraska carved out a specific exception for public policy. Nebraska is very clear when it adopted its – its arbitration, Uniform Arbitration Act, it did not carve out that exception. It could have if it wanted to. But it did not.

And so what I would tell you is that if you went ahead in that direction, you're going to be basically doing what the legislature did not want to do, and that is create a public policy exception to the arbitration. They did not do it – legislatively, I would encourage [9] you in that this case you don't want to do it.

JUSTICE SIEVERS: Mr. Valentino –

MR. VALENTINO: I think –

JUSTICE SIEVERS: – does the legislative history indicate whether the legislature considered carving out that exception?

MR. VALENTINO: It doesn't indicate it one way or the other. They were after the Uniform Act, as a matter of fact.

JUSTICE SIEVERS: Thank you.

MR. VALENTINO: The other part of our contract that we deal with is Article 29. And the arbitrator, by the way, had our contract. It had the policies. It had everything it needed – he needed to do his 47-page opinion.

Now, 29.1.2 of the act specifically says, "Disciplinary action shall be based upon good faith for just cause for violations of policies and procedures of the agency or this agreement."

We bargained for our due process rights. And the disciplinary actions that can be [10] covered are above, would include written warning, disciplinary probation, suspension, demotion, reduction in pay or discharge.

An arbitrator acting under our contract could pick any one of those things if it disagreed with the employer's decision to discharge. It's within their authority to do so.

The next page that I have on our – on our – on our view here is that 29.2.3 deals with progressive discipline techniques. This is a bargained-for provision. And the goal of progressive discipline is to apply the minimum level of discipline to bring the employee's performance to the expected level.

29.3.1 is our due process provisions, dealing with conducted in accordance with due processes provided for in the labor agreement and for good faith for just cause; that our bargaining unit members are entitled to fair and impartial investigations when an employer deemed it to be necessary.

JUSTICE WRIGHT: Counsel, are you arguing that, because of the arbitration agreement that the Court cannot consider [11] whether or not the award violated public policy?

MR. VALENTINO: I'm going to get there, and I'm going to tell you why that is.

JUSTICE WRIGHT: That's your argument?

MR. VALENTINO: Yes. That is – that I will tell you was considered by the arbitrator. And I'll show where it was considered by the arbitrator.

29.7.2 of our contract specifically provides in the procedures and safeguards section, that investigations conducted by the agency will not knowingly commit any act which would deprive the bargaining unit member of any statutory or constitutional rights or privileges.

That is in our contract. That is one of the things the arbitrator considered in this case. That is one of the things the arbitrator decided against the State based on the weight of the evidence presented to him.

The next section that we deal with is another contractual provision that the arbitrator felt had been violated in case. And [12] that is that there was a time limit put on the investigation process. And it's put on there by contract, and it's supposed to be completed in 45 days.

The arbitrator clearly found in this case that the – that the investigator failed to comply with this provision, failed to comply in several different respects, let the time limit expire and, also, did not notify Bob Henderson of any extensions that were being sought because they were conducting this investigation surreptitiously, arguing that it was, quote, serious misconduct and they could somehow escape the contract by doing that.

The arbitrator found against them on all of those issues.

Now, Justice Wright, I want to get to your question.

Exhibit No. 3 might – second page, Arbitrator Caferra, when he was addressing this at the very end, specifically said, "We have claims of First Amendment, Fourth Amendment and a relationship between those and the contract."

My guess is that there may be some arguments that get raised regarding public [13] policy of the State of Nebraska. And we had some mention before of attorney general opinion letters which may or may not exist. I know they were not sought at this point. I don't know what else is out there. I would suggest that the parties be well served by briefing on this issue.

It went on further, "I will take it however you give it. But with the various constitutional issues that relate to the contract and state law, I think you would be doing yourselves a great disservice by not briefing it."

I want to tell you that when we – they brought in a public policy witness. The guy's name was John Kelley. He was an FBI agent that investigated the Mississippi burning cases back in 1964. That's when Bob Henderson was seven years old.

JUSTICE CONNOLLY: Before you get in there, what – public policy are we focusing on the – Mr. Henderson's conduct or the public policy focused in on the remedy that the arbitrator gave?

MR. VALENTINO: Under all the [14] federal decisions, the remedy that the arbitrator gave, the reinstatement, which is a bargained-for process, is what we focused on. You can't focus on the conducted.

The case law in that regard is so clear, it's just so crystal clear, that whatever the State talks about in

their brief about the gleanings that they take from this record are not the findings of the arbitrator. It's the findings of the arbitrator. It is the final goal, his reinstatement, that is the issue on public policy.

JUSTICE CONNOLLY: The remedy?

MR. VALENTINO: The remedy itself. And that's so clear in Eastern Coal it's not – it's just as plain as the nose on your – it's there. It clearly says that.

JUSTICE STEPHAN: Do you understand the remedy to permit the State Patrol to reinstate Mr. Henderson to his position at the time of discharge but then immediately transfer him to another position if it concludes that it's necessary for the good of the order and the maintenance of the order, essentially?

[15] MR. VALENTINO: Do you have page 7?

MR. KRATVILLE: Yep.

MR. VALENTINO: Right there on No. 6, the arbitrator's award, "Nothing in this award shall prevent the Nebraska State Patrol from reassigning the grievant in the future, if necessary, to maintain the good order and efficiency of the agency."

JUSTICE CONNOLLY: They could put him in a broom closet?

MR. VALENTINO: They could have him cleaning Glocks in the supply area.

JUSTICE STEPHAN: Who makes the determination of the necessity of that?

MR. VALENTINO: The colonel does. But if you notice, the arbitrator retains jurisdiction for several different things, backpay and also to address any issues concerning the implementation of this award.

Either party could go back and talk about where Mr. Henderson could be reassigned to, as a matter of fact.

The backpay award is even – is even more interesting because it fits some of the [16] cases that we've talked about. Nothing in the arbitrator's decision condoned Henderson's conduct.

If you read – if you read the arbitrator's decision, he clearly did not condone or approve of Bob Henderson's conducted, which – which, for all practical purposes, was getting on the wrong website at the wrong time.

I mean, we all make stupid decisions in our life about what websites we want to visit. But do you get fired for it when you're in your own home on your own private time?

JUSTICE MILLER-LERMAN: In this arbitration award, could Mr. Henderson at some point be reassigned to activities that directly interact with the public?

MR. VALENTINO: He could be. He could be. But he would be reassigned by the colonel only. It is the colonel who makes the full determination of where they want Bob Henderson.

And if they say we don't want Bob Henderson stopping traffic, we could put Bob Henderson in supply.

[17] There are 13 different divisions in Nebraska State Patrol.

JUSTICE WRIGHT: Could they have awarded the officer his backpay and retirement but not reinstated him to the State Patrol?

MR. VALENTINO: I'm sorry?

JUSTICE WRIGHT: Could he have awarded him his backpay and retirement but not have reinstated him to the position of Nebraska state patrolman which he will hold regardless of where he's placed?

MR. VALENTINO: Bob has four more years left before he's eligible for retirement. Bob had 21 years in at the time. As we speak today, Bob's 21st anniversary date would be September 14th of 2008.

Yeah, the patrol can place him into that position, frankly.

JUSTICE STEPHAN: Into what – into what position?

MR. VALENTINO: Into any position they want to.

JUSTICE STEPHAN: Immediately?

MR. VALENTINO: Immediately.

JUSTICE STEPHAN: So –

[18] MR. VALENTINO: They declined – They they declined – they declined to take the award for what it was.

JUSTICE WRIGHT: He's still a member of the Highway Patrol?

MR. VALENTINO: As we speak today, no. He was discharged.

JUSTICE WRIGHT: So he will be?

MR. VALENTINO: He would be a member of the Nebraska State Patrol.

JUSTICE STEPHAN: But it – it would be perfectly consistent with the remedy if he were reinstated that he would never be allowed to work in the same position that he worked at the time of his discharge?

MR. VALENTINO: That could be. And that would be exactly probably what they would do.

They could – they could assign him to the supply division. They could supply him to communications. They could have him cleaning out desks for the next three or four years if they wished to do that.

They didn't wish to do that. They wished to have the arbitration decision set [19] aside. They didn't want to accept the findings of the arbitrator even though they're final and binding on both parties.

You know, it is what it is. And certainly the arbitrator's narrow – the arbitrator's narrow scope –

JUSTICE SIEVERS: Mr. Valentino, if the – if public policy goes to the relief granted by the arbitrator as opposed to the employee's underlying conduct – I think that's your position?

MR. VALENTINO: Yes.

JUSTICE SIEVERS: In an employment context, I'm trying to think of a situation in which the remedy, the typical remedy's going to be reinstatement and backpay. How could that ever violate public policy if you don't examine the underlying conduct?

MR. VALENTINO: Because it is the – it is the reinstatement – well, first of all, you have to accept the findings of the arbitrator, period, No. 1, on – but – but what you're talking about is always kind of the – that's why Justice Scalia wrote his dissent in Eastern Coal.

[20] If you read his dissent, what he basically is saying is I can't conceive of any case unless it violated positive law, unless it violated positive law.

And the arbitrator will either say this guy smoked marijuana on the job or on heavy machinery or he didn't. If the arbitrator makes that finding,

which is binding, and the Court in this case accepted the arbitrator's findings, which are binding, then if it violates positive law because there's a public policy argument then to be made on the reinstatement, that's – that's the distinction that I think you're –

JUSTICE SIEVERS: Positive law being a statute that says you can't smoke dope and operate a Caterpillar at the same time?

MR. VALENTINO: Right. But it has to be a well-defined and dominant and explicit public policy, right.

JUSTICE SIEVERS: Absent – absent that sort of statute, then the public policy exception disappears?

MR. VALENTINO: It will. And that's why – otherwise, what you're going to [21] do is you're going to have judges pouring in their subjective ideas about what broad amorphous public policy should exist to set aside any order.

Once you open that door – the majority of the appeals are from employers. The majority of these appeals are from employers. They didn't like what the arbitrator did, and so they – they get creative with public policy.

And you know what? If you have somebody that spits on the sidewalk or curses and swears or commits adultery, there are statutes in Nebraska that exist against those things.

If I have somebody I represent who is having an affair off duty, that person could be terminated; and if he's not terminated, if he's reinstated because he's got a clear record, the State's going to take an appeal, we've got a statute, says you can't commit adultery, ha, ha, we win, public policy.

Don't open that door on this case. Thank you.

MR. STINE: Good morning, Your Honors. May it please the Court, my name is [22] Tom Stine, assistant attorney general representing the State of Nebraska.

Your Honors, we're here today to, again, ask this Court to affirm the decision of the Lancaster County District Court which found that the arbitrator's remedy did, in fact, violate public policy of the State of Nebraska.

Back in May this Court asked the parties to address four specific questions. And I'm going to address those questions.

No. 1, can judicial review be limited by the collective bargaining agreement? You talked about that a little bit with Mr. Valentino, can that collective bargaining agreement, in essence, cut off this Court's ability to review the arbitrator's remedy? The State asserts that, no, Your Honors, it cannot.

There is clear statutory constitutional law in Nebraska that gives this Court, gives the district court the judicial power to review contracts to make

sure that those contracts comply with public policy and that they comply with the law.

This Court has the power to strike any provision in any contract that is contrary to [23] public policy.

As this Court stated in Hood versus Triple A Motor Club, "The freedom of contract is restricted by law for the good of the community."

Now, this principle was expanded in the federal courts. In the federal court system in Hurd versus Hodge, the U.S. Supreme Court case that stated, "Where the enforcement of private agreements would be violative of public policy, it's the obligation of the Courts to refrain from enforcing those contracts.

JUSTICE STEPHAN: I guess the critical issue here is who defines public policy?

MR. STINE: Public policy is determined by laws and by legal precedence.

JUSTICE STEPHAN: Positive law?

MR. STINE: Positive laws and positive legal precedence, case opinions.

There are – there are examples in – in many of the cases where you're dealing with a positive law about a – that deals with a certain particular area of law. Then you have legal decisions that follow that, And you also [24] have – in some cases you will have regulations. And you'll have policy manuals.

JUSTICE STEPHAN: Is it your position that reinstatement in this case would violate some positive law?

MR. STINE: A positive law? I'm not sure that you can point to specific statutes and say, yes, it would violate that statute.

JUSTICE STEPHAN: Then what do we do with Eastern Coal where the Court seems somewhat split on whether a violation of positive law is required but would seem to be leaning in that direction?

MR. STINE: The Eastern Coal opinion dealt with a specific set of facts. Got a little different set of facts where in order for Eastern to take that position, that positive law has to be violated, the Courts would have to initially say, well, we're going to have to have – we'll just have to hope that the legislature has passed every single possible law that they could think of to address every single situation.

JUSTICE STEPHAN: But you [25] can't –

MR. STINE: It's not possible.

JUSTICE STEPHAN: – point us to a law that would be violated in – a statute that would be violated if this person is reinstated to the State Patrol?

MR. STINE: The specific law, certainly not. I can point you to a public policy that would be violated that is – that is shown by our laws that we have in Nebraska.

JUSTICE MILLER-LERMAN: Is there precedent that would embody that public policy to which you refer?

MR. STINE: Precedent?

JUSTICE MILLER-LERMAN: Are there cases that would embody the public policy you wish us to refer to?

MR. STINE: Oh, certainly there are. In fact, there are a number of cases out there that have dealt specifically with police officers engaging in racist behavior or in behavior that – like, for a sexual harassment behavior that they – that the Courts have said, okay, that type of behavior violates a public policy of the state against race [26] discrimination or against sexual harassment or sexual discrimination.

JUSTICE MILLER-LERMAN: Are they – are those cases saying certain conduct violates – is violative of public policy because the individual is a police officer?

MR. STINE: I believe in – I'd have to check for sure. But I believe in the – Weicherding was not an arbitration case. Weicherding was a First Amendment rights case.

JUSTICE MILLER-LERMAN: How about – is it Pappas?

MR. STINE: Pappas versus Giuliani is a particular case that clearly the conduct that was there – that they – the police officers were doing

there was violative of the public policy of the state against discrimination.

JUSTICE MILLER-LERMAN: And that was – accommodated the fact that the actor was a police officer; is that right? That was relevant.

MR. STINE: That's correct. That's correct. That kind of – that jumps us, if you will, to question No. 4 of this Court. [27] And you folks talked a lot about it with Mr. Valentino. And that's the context in which this Court examines the public policy exception.

JUSTICE MILLER-LERMAN: Let me just back up there.

MR. STINE: Sure.

JUSTICE MILLER-LERMAN: The case to which you and I were referring, Pappas, was not – didn't have the arbitration layer –

MR. STINE: That is correct.

JUSTICE MILLER-LERMAN: – is that correct?

MR. STINE: That is correct. And we run into that with a number of different cases here. We have some arbitration cases that talk of – specifically about the public policy violation, and they run through the step analysis on how to do that.

And we also refer the Court to other cases dealing with constitutional issues that address the specific situation of police officers who are engaging in actions that we feel are violative of the public policy exception and then are not allowed, if you [28] will, to retain their employment.

So it – it – it's a little bit of a meld, if you will, between the two concepts and ideas.

JUSTICE STEPHAN: Do you agree with counsel's position the narrow question before us is whether the remedy violates the public policy?

MR. STINE: Absolutely. No doubt about it. The – the public policy exception – going on to question No. 2, the public policy – does the public policy exception forbid enforcement of the collective bargaining agreement? Certainly not. Not at all.

The public policy exception is a tool used by the Courts to strike specific provisions that are offensive to the public policy concept.

JUSTICE MILLER-LERMAN: Would the arbitrator's remedy, if enforced, permit reassignment of Mr. Henderson?

MR. STINE: No, the arbitrator's remedy does not. Contrary to what – to what the appellants think, the arbitrator's [29] remedy – and paragraph 1 of the decision is very specific. And that remedy is that Mr. Henderson is to be reinstated to the position he held on March 2nd, 2006, which is a State Patrol

officer patrolling the streets and the – and the highways of Nebraska.

JUSTICE STEPHAN: You have to read that in conjunction with paragraph 6, which says, "Nothing in this award shall prevent the Nebraska State Patrol from reassigning the grievant in the future under two circumstances."

MR. STINE: That's right.

JUSTICE STEPHAN: "One, if necessary to maintain the good order and efficiency of the agency, or to eliminate or mitigate acts of civil disruptions that may occur as a result of the public becoming aware of these events."

MR. STINE: That's correct.

JUSTICE STEPHAN: Apparently Mr. Henderson reads that to say that the colonel could immediately reassign, based upon his managerial decision, that Mr. Henderson working in his prior position would be contrary [30] to good order and efficiency of the agency. Do you disagree with that?

MR. STINE: I do disagree with that. I'll take that in reverse order if I may.

It is – the two – the two conditions, if you will, that if you read into No. 6, how a reassignment may – may happen.

The second one is, actual civil disruptions. And I, frankly, find that somewhat offensive that the arbitrator thinks that the State Patrol actually has to

wait until there's a riot or that there's some type of civil disturbance or disruption in order to act.

JUSTICE STEPHAN: I'm not sure that's what the arbitrator thinks because he uses the word "or" between the two circumstances which would warrant reassignment.

MR. STINE: That's right. And the first one is if necessary to maintain good order. You have to read into that that there must not be good order to begin with in order – in order for it to be necessary to maintain good order.

[31] JUSTICE STEPHAN: Doesn't the arbitrator himself suggest in other places in the award that the public trust in the State Patrol is going to be injured if Mr. Henderson is out there stopping speeders?

MR. STINE: Already has been injured, Your Honor. It's already there. And the arbitrator has already found that.

JUSTICE WRIGHT: What is the public policy that you're talking about that is at issue here?

MR. STINE: The public policy is that – the general public policy that we're talking about is the policy against race discrimination and to a certain extent religious discrimination. The members of the KKK also tend to discriminate so – we're really talking about race discrimination.

JUSTICE WRIGHT: It's not disputed that this Knights party was affiliated with the KKK or, in effect, was the KKK?

MR. STINE: I don't think that's in dispute at all, Your Honor.

JUSTICE WRIGHT: What's the significance of the fact that Trooper Henderson [32] took an oath to support the white race? Is that significant factor?

MR. STINE: Your Honor, it's – it's a huge significant factor in our opinion. A – in fact, one of the primary significant factors in our opinion. It, again –

JUSTICE WRIGHT: Make any difference whether he did it on duty or off duty?

MR. STINE: Absolutely not. It doesn't make a difference at all.

This is the – a State Patrol officer's off-duty conduct is just as important as their on-duty conduct. That's set forth in the policy and procedure manual.

JUSTICE WRIGHT: Are patrolmen treated differently than other public employees because they're members of a paramilitary group?

MR. STINE: Yes, they are. This Court said last year in the Omaha Police Union case that the members of a paramilitary organization are treated differently; that, in fact, employers of law enforcement officers are given little bit more latitude with

[33] discipline and personnel matters because of that.

JUSTICE WRIGHT: As I understand it, Grace and Misco and Eastern Coal cases, it wasn't necessary to violate a public – a positive law in order to implement public policy considerations in determining arbitration awards.

MR. STINE: That – I think if you look at –

JUSTICE WRIGHT: It couldn't be simply a subjective determination made by the Court. It had to be established public policies or well-understood public policies that would come into play in determining the arbitrator's award.

MR. STINE: That's correct. The – the common phrase is dominant, well-defined public policy. That's correct.

In Grace and Misco say that. I think you can – again, the Eastern Associated Coal might sort of look at the positive law aspect a little bit. But that's correct.

JUSTICE WRIGHT: But Eastern Coal dealt with a private employee?

[34] MR. STINE: Correct.

JUSTICE STEPHAN: If the public policy you're talking about is – the general public policy is racial discrimination, is it necessary then for you to show that reinstatement would result in racial discrimination?

MR. STINE: Oh, certainly not, Your Honor. It's – the public policy by – the public policy we're talking about is race discrimination. That public policy, if you will, is embodied or reflected in officers of the State Patrol in the context in which they act and interact with members of the public.

So, in other words, you don't have to show that, gosh, if we reinstate him, he's going to go out right away and he's going to start harassing persons of color. That's not what has to be shown.

The only thing that has to be shown is that if the remedy is, in fact, left as it would be, would reinstatement of Trooper Henderson violate the public policy as it's embodied or reflected by State Patrol officers.

JUSTICE STEPHAN: Would public [35] policy be violated if Henderson were reinstated and placed in a position where he had no contact with the public?

MR. STINE: I think it would. I – in the context of – as the arbitrator already found, the damage, if you will, has already been done by Mr. Henderson. The fact that he joined the racist organization and took the pledges –

JUSTICE CONNOLLY: But we don't look at his conduct.

MR. STINE: No, you don't. You don't look at his conduct to determine whether public policy's been violated. But you have to look at that conduct to

determine whether the remedy, whether putting him back in that situation, back in that environment would violate the public policy.

Because of the actions that he took – and the arbitrator found this – he's already set in motion, if you will, the negative publicity, the negative perception, the negative working relationship and morale and order of the organization. Now –

JUSTICE MILLER-LERMAN: Are you [36] referring to what Pappas calls strife among fellow police officers?

MR. STINE: Some of that. Although, it's certainly possible, that's correct, the good order and morale among fellow officers.

And there is a lot – I think there is a lot of emphasis placed on the fact that, gosh, there was no evidence of any of that put in at trial. There was no evidence of any of that because we caught it in time. We didn't allow it to happen.

And that kind of goes back, Your Honor, to your question, I mean, there's a certain amount of discretion that's allowed of public officials dealing with paramilitary organizations that they have to sometimes take that action ahead of time.

JUSTICE CONNOLLY: Would your position be the same if it was spousal abuse or adultery?

MR. STINE: Perhaps. I mean, we dealt with some of the spousal abuse questions with I think the Hauser case.

JUSTICE CONNOLLY: But not as [37] strong as racial discrimination.

MR. STINE: Well, I don't know. I mean, given the –

JUSTICE CONNOLLY: So is it a floating target?

MR. STINE: It's somewhat – it's not an exact target. And it's not meant to be, if you will. I mean, the public policy exception is a very specific, very narrowly tailored exception specifically aimed at the particular action that we're talking about.

JUSTICE CONNOLLY: They said before that's an unruly horse, public policy.

MR. STINE: It can be. And that's why, frankly, it's left to your discretion and not an arbitrator's discretion.

JUSTICE STEPHAN: That may also be why members of the U.S. Supreme Court think that it requires a showing that the remedy would violate positive law in order to violate public policy.

MR. STINE: I – and I – I respectfully understand your position, Your Honor. But I'm not convinced that that's what is required under the standard of the public – [38] of the public policy exception.

I do not believe that – and I don't believe that all of the case law indicates that there has to be a positive violation of positive law.

Again, to do that, you would have to assume and hope that the legislature could think of every particular situation that may come up. And I'm not so sure that that's required.

JUSTICE SIEVERS: I want to make sure I understand the State's position. And as I hear what you're saying, it's that the remedy is viewed through the lens of public policy?

MR. STINE: Correct.

JUSTICE SIEVERS: And if we go back to either Justice Stephan or Connolly's example, if we stick this guy – if he's stuck in a broom closet, cleaning guns for the next whatever, five years, how does that impact public policy, the public policy against racial discrimination?

MR. STINE: It – it could impact it a number of different ways, Your Honor. The one that we have consistently spoke [39] about is the one that's related to the finding, if you will, of the arbitrator, that the mere fact that the Nebraska State Patrol would be forced, if you will, to employ somebody who either was a member or is a member of an organization, racist organization affiliated with the KKK would cause fear and disruption within the agency, not just against Trooper Henderson but against the

entire agency and the entire troopers in that – I see my time has ended.

JUSTICE SIEVERS: And is that statement made in the context that this individual is in a back room someplace cleaning guns and filing paper for the rest of his career?

MR. STINE: Again, my time has ended.

JUSTICE SIEVERS: You have to answer.

MR. STINE: It's made in the context of the fact that there was – that I – mean, if you read the – all of the – there are a number of different statements by the arbitrator concerning the concerns he has about [40] Henderson joining this racist organization. And it's made in the context overall, the broader context of here's a State Patrol officer who joined a racist organization and may be out there on the streets, patrolling the streets when there are members of a group that that type of organization is designed, frankly, to eliminate and get rid of.

And that's a – I mean, that's a powerful, powerful statement. That's a powerful position to be in and – for a paramilitary organization who has to rely, frankly, on the trust of the community, on the perception that it – that it has in the community that it will only employ people –

JUSTICE SIEVERS: I think that answers my question. Thank you.

MR. STINE: Okay. Your Honors, thank you very much. Again, we ask this Court to affirm the decision of the Lancaster District Court.

JUSTICE WRIGHT: We've reserved how much time for rebuttal?

THE CLERK: He already went over two minutes, So he's at 17 minutes.

[41] JUSTICE WRIGHT: There's no rebuttal time left, so that concludes our arguments for today, and we are adjourned.

(Concluded at 11:04 a.m. a.m.)

IN THE MATTER OF ARBITRATION

Between **ROBERT HENDERSON,** **Appellant,** **vs.** **NEBRASKA STATE PATROL,** **Respondent.**	**MUTUAL AGREEMENT TO EMPLOY ARBITRATOR**

Pursuant to Section 8.5 of the 2005-2007 Labor Contract between the State of Nebraska and the State Law Enforcement Bargaining Council (SLEBC), the parties have agreed to submit this dispute to voluntary and final binding arbitration. As an agreement has been reached, the parties hereby submit the dispute to Paul J. Caffera as Arbitrator.

The parties agree that the fees and expenses of the arbitrator shall be borne equally by the parties involved. The parties certify that the arbitrator was chosen in accordance with the provisions contained in the labor contract.

Robert Henderson	Nebraska State Patrol
Appellant	Respondent
by /s/ Vincent Valentino	by /s/ Fred King
Signature	*Signature*
4/25/06	4/26/06
Date	*Date*